

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. **76-290**

AMERICAN CIVIL LIBERTIES UNION AND JANE KOE,

Petitioners,

versus

O. HARRY BOZARDT, JR., H. HAYNE CRUM, JOSEPH
O. ROGERS, JR., MARION H. KINON, EDWARD M.
ROYALL, II, GEORGE F. COLEMAN, ROBERT A.
HAMMETT, THOMAS J. THOMPSON, COMING B. GIBBS,
JR., LOWELL W. ROSS, FRANK E. HARRISON, J.
MALCOLM McLENDON, C. THOMAS WYCHE, WILLIAM
L. BETHEA, JOHN B. McCUTCHEON, MELVIN B.
McKEOWN, JR., individually and as members of
the Board of Commissioners on Grievances and
Discipline, and their successors; and THE
ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	<u>Page</u>
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTION AND OTHER PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. The doctrine of ^{OF} comity does not require that federal courts defer, for the enforcement of federal constitutional rights, to administrative bar disci- plinary proceedings concerning non-criminal conduct that is alleged to be "unethical."	10
A. The court below decided an important question of federal practice by an unprecedented and unwar- ranted extension of the application of the doctrine of comity.	10
B. This Court should grant the writ of certiorari to resolve a conflict among the circuits as to the ap- plicability of the doctrine of comity to administrative disciplinary proceedings for non-criminal conduct.	14

II. The decision below is in conflict with prior decisions of this Court concerning standing to seek declaratory relief on behalf of an organization, regardless of proceedings pending against others. 16

III. The decision below is directly in conflict with decisions of this Court defining exceptions to the bar to the exercise of federal jurisdiction imposed by the doctrine of comity. 20

CONCLUSION 24

APPENDIX

Opinion of the Court of Appeals for the Fourth Circuit dated March 8, 1976 1a

Order of the Court of Appeals for the Fourth Circuit denying rehearing, dated April 30, 1976 18a

Order of the United States District Court for the District of South Carolina dismissing original complaint, dated December 23, 1974 27a

Order of the United States District Court for the District of South Carolina denying amending or altering of its December 23, 1974 order and denying retention of jurisdiction, dated January 24, 1976 48a

Constitutional and Other Provisions Involved 51a

TABLE OF CITATIONS

Cases:	Page
Allee v. Medrano, 416 U.S. 802 (1974).....	10
Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975).....	8
Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975).....	15, 16
Baggett v. Bullitt, 377 U.S. 360 (1964).....	22
Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).....	19
Brown v. Board of Education, 347 U.S. 483 (1954).....	9
Burns v. Clayton, 236 S.C. 316, 117 S.E.2d 300 (1960)....	12
Burrell v. McCray, U.S. ___, 96 S.Ct. 2640 (1976).....	14
Conley v. Gibson, 355 U.S. 41 (1957).....	23
Cooper v. Pate, 378 U.S. 546 (1964).....	23
Damico v. California, 389 U.S. 416 (1967).....	14
Doe v. Pierce, C.A. No. 74-475 (D.S.C.).....	7
Dombrowski v. Pfister, 380 U.S. 479 (1965).....	18, 21
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).....	10, 11, 20
Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972)....	12, 14, 16
Gardner v. Toilet Goods Association, 384 U.S. 167 (1967).....	23
Geiger v. Jenkins, 401 U.S. 95 (1971).....	11
Giaccio v. Pennsylvania, 382 U.S. 399 (1966).....	22

Gibson v. Berryhill, 411 U.S. 564 (1973).....	10, 11, 14
Gooding v. Wilson, 405 U.S. 518 (1972).....	22
Hernandez v. Danaher, 405 F.Supp. 757 (N.D.Ill. 1975).....	11
Hicks v. Miranda, 422 U.S. 332 (1975).....	10
Houghton v. Shafer, 392 U.S. 639 (1968).....	14
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).....	10, 12, 20, 21
Hynes v. Mayor of Oradell, U.S. ___, 96 S.Ct. 1755.....	22
Jenkins v. McKeithan, 395 U.S. 411 (1969).....	23
Juidice v. Vail, F.Supp. ___, (S.D.N.Y. 1976), cert. granted, 44 U.S.L.W. 3734 (U.S. June 21, 1976) (No. 75-1397).....	11
In re Kennedy, 254 S.C. 463, 176 S.E.2d 125 (1970)....	12
King v. Smith, 392 U.S. 309 (1968).....	14
Kugler v. Helfant, 421 U.S. 117 (1975).....	10
Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971).....	19
Lewis v. New Orleans, 415 U.S. 130 (1974).....	22
McNeese v. Board of Education, 373 U.S. 668 (1963).....	14
NAACP v. Button, 371 U.S. 415 (1963).....	passim
Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973).....	15
Roe v. Wade, 410 U.S. 113 (1973).....	19
Steffel v. Thompson, 415 U.S. 452 (1974).....	10, 16, 19
Taylor v. Kentucky State Bar Association, 424 F.2d 478 (6th Cir. 1970).....	15

Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973).....	19
Trainor v. Hernandez, 44 U.S.L.W. 3702 (U.S. June 7, 1976) (No. 75-1407).....	11
United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967).....	19
United States v. Mississippi, 380 U.S. 128 (1965).....	23
United Transportation Union v. Michigan, 401 U.S. 576 (1971).....	19
Younger v. Harris, 401 U.S. 37 (1971).....	passim

Constitutional Provisions:

Amendment One.....	3
Amendment Fourteen, §1.....	3

Statutes:

Rule 59, Federal Rules of Civil Procedure.....	1
28 U.S.C. §1254(1).....	2
28 U.S.C. §1257.....	13
28 U.S.C. §§1331, 1343.....	3
42 U.S.C. §1983.....	3, 14
42 U.S.C. §1988.....	3

Other Authorities:

American Bar Association, Code of Professional Responsibility, Dis- ciplinary Rule 2-103(D).....	3, 8
New York Times, July 22, 1973, p. 30.....	5
Stern and Gressman, Supreme Court Practice (4th ed. 1969), §§3.20, 3.24..	13
Supreme Court of South Carolina, Rule on Disciplinary Procedure §4.....	3, 12

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at ___ F.2d ___ and is appended hereto at 1a. The denial of the petition for rehearing and suggestion for rehearing en banc is appended hereto at 18a. The statement of Judge Winter, joined by Judges Craven and Butzner, dissenting from the denial of rehearing en banc, is appended hereto at 20a. The opinion of the United States District Court for the District of South Carolina is unreported and is appended hereto at 27a. The opinion of the district court denying a motion to alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure is also unreported and is appended hereto at 48a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on March 8, 1976. The time was extended for filing a petition for rehearing and suggestion for rehearing en banc, which was then filed, and the order denying such petition was filed on April 30, 1976. By order of July 23, 1976, the circuit justice extended

the time for filing this petition to August 26, 1976. This court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether administrative bar disciplinary proceedings for non-criminal conduct alleged to be "unethical solicitation" are to be given the same deference under the doctrine of comity as state court proceedings for the enforcement of the policies of state criminal laws?
2. Whether bar disciplinary proceedings against one member of a private, non-profit legal service organization forecloses, under the doctrine of Younger v. Harris, the organization from seeking declaratory relief on behalf of the organization and its members against whom no state proceedings of any kind are pending?
3. Whether a complaint that alleges that state administrative proceedings were (1) instituted in bad faith, (2) instituted with a desire to harass and retaliate against the plaintiffs for engaging in constitutionally protected activity, and (3) instituted pursuant to a statute flagrantly and patently violative of express constitutional prohibitions against vagueness and overbreadth, was subject to dismissal under the doctrine of comity because it did not also allege that there was no "reasonable prospect" that the state court would correctly apply federal constitutional principles?

CONSTITUTION AND OTHER
PROVISIONS INVOLVED

The constitutional provisions and other provisions of law involved in this case are set forth in full in the Appendix, p. 51a et seq., as follows:

United States Constitution,
Amendment One

United States Constitution,
Amendment Fourteen, §1

United States Code, Title 42,
§ 1983

Supreme Court of South Carolina,
Rule on Disciplinary Procedure, § 4

American Bar Association, Code of
Professional Responsibility, Disci-
plinary Rule 2-103(D)

STATEMENT OF THE CASE

Petitioners, the American Civil Liberties Union and Jane Koe [a fictitious name for a black woman attorney who was an officer of the South Carolina affiliate of the ACLU], brought this action in October, 1974, in the federal district court pursuant to 42 U.S.C. §§ 1983 and 1988, founding jurisdiction on 28 U.S.C. §§ 1331 and 1343. Petitioners sought injunctive and declaratory relief from an administrative proceeding before the Board of Commissioners on Grievances and Discipline for the bar of the State of South Carolina, in which Koe was charged with "soliciting" a client for the ACLU. Petitioners alleged that this disciplinary proceeding had been

instituted in bad faith by the Office of the Attorney General of South Carolina in retaliation for a lawsuit brought by the ACLU. That lawsuit attacked sterilizations performed by private physicians, allegedly by coercion, of minority women receiving federal and state Medicaid benefits. In that action the Attorney General represented Welfare officials who allegedly approved the practice of coercing sterilizations to be performed on Medicaid patients. This action also challenged the disciplinary proceeding as being pursuant to a vague and overbroad statute. The district court held that the action should be dismissed, both as to the subject of the Board proceedings, Ms. Koe, and as to the ACLU, which was not and could not be a party to the Board proceedings. The court of appeals, adopting the reasoning of the district court, affirmed the dismissal. 17a.

Judge Winter, joined by Judges Craven and Butzner in dissenting from the denial of rehearing en banc, found that the principles of Younger v. Harris had been improperly applied by the district court and by the panel, 20a-21a, 23a:

[H]ere there is pending a state administrative proceeding, the object of which is to determine if the individual plaintiff should be subjected to disciplinary action, not criminal sanctions, for alleged misconduct as a member of the bar.

* * *

Although the district court ought not to enjoin the administrative proceedings

unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted because the proceeding is criminal or quasi-criminal in nature. (Emphasis in original.)

Judge Winter also noted that the ACLU clearly had a legitimate standing in the case, 24a-25a:

The impact of the state proceedings on the willingness of lawyers to volunteer and cooperate with ACLU in providing legal assistance to those whose constitutional rights have been violated is manifest. The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available--are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities.

In 1973, national attention was drawn to the plight of women in Aiken County, South Carolina, by a pregnant mother who was temporarily on welfare. Every obstetrician in Aiken County required that she submit to sterilization after her delivery in order to receive care as a Medicaid patient. New York Times, July 22, 1973, p. 30. According to an affidavit filed in this action signed by another mother [Mrs. "M.W."], who was allegedly "solicited" by petitioner Koe, the following subsequently occurred:

In July, 1973, [M.W.] met with a number of individuals including [Jane Koe] at a meeting held at the office of Mr. Gary Allen. Mr. Allen had seen her prior thereto and informed her that the meeting was for the purposes of discussing sterilizations performed by physicians in Aiken County and remedies available to women who had been sterilized, including suits for damages against the doctors involved. Desiring to learn more about her legal rights and remedies, if any, she attended the meeting and while there met [Jane Koe] for the first time.

At that meeting or during conversations after that meeting, [Jane Koe] explained to her what her rights and remedies were as far as her sterilization was concerned, and informed her of her right to bring an action for injunctive relief and damages. [Jane Koe] did not, however, attempt to persuade or pressure her to file a law suit or offer to represent her for a fee or otherwise.

According to petitioners' complaint in this federal action, Gary Allen then contacted Jane Koe and asked that the ACLU represent Mrs. M.W. Jane Koe then wrote Mrs. M.W., in response to this request, that the ACLU would like to represent her in connection with her sterilization. At the instance of the attorney for the defendant physician,

Mrs. M.W. decided not to proceed with the litigation.

Two other black women who had been sterilized, or threatened with sterilization, did file a damage suit, against M.W.'s physician and Welfare Department officials, through lawyers associated with the ACLU. Doe v. Pierce, Civil Action No. 74-475 (District of South Carolina).¹ As further set forth in the complaint and other papers filed in the district court, attorneys in the office of the Attorney General of South Carolina, who were responsible both for defending state defendants in Doe v. Pierce and for prosecuting matters before the Grievance Commissioners, obtained the letter from Koe to M.W., but did not present it to the Board on Grievances and Discipline until several months later, after an unsuccessful attempt to have Doe v. Pierce dismissed on the basis of Ms. Koe's letter to Mrs. M.W. The complaint in this action specifically alleged, as must be considered true at this stage of the proceedings, that officials in the Office of the Attorney General of South Carolina referred this matter to the Board on Grievances and Discipline in retaliation for the bringing of the sterilization lawsuit.

1. Judgment for nominal damages was awarded against the physician on behalf of one woman who was prematurely discharged from the hospital when she refused to consent to sterilization after delivery. The matter is presently on appeal.

In the context of the above alleged events, the respondent Board of Commissioners, on January 9, 1976, gave Ms. Koe a private reprimand on the basis of a panel report² that relied upon the following rationale:³

The evidence is inconclusive as to whether the Respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially [by a possible award of attorneys' fees] in the event of successful prosecution of the suit for money damages.

* * *

[Koe] has, therefore, violated DR 2-103 (D)(5)(a) by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where [Koe's] association is a staff counsel for the non-profit organization.

Disciplinary Rule 2-103 (D), by its terms, solely prohibits an attorney from "knowingly

2. This Report was submitted to the court of appeals, which declined to consider it. 10a-11a, footnote.

3. It should be noted that the financial benefit potentially available to the ACLU -- attorneys' fees awarded, in addition to damages, by the federal court -- would be available only in circumstances of egregious misconduct by the defendants, since no federal statute authorized court-awarded attorneys' fees in such cases. Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975).

assist[ing] a person or organization...to promote the use of his services or those of his partners or associates." Ms. Koe never promoted the use of her own professional services, or those of her associates. Indeed, the uncontradicted allegations of the complaint establish that the offending letter was written at the express request of Gary Allen, whom Koe reasonably believed to be acting on behalf of Mrs. M.W.

Petitioner Koe has filed a petition with the Supreme Court of South Carolina for review of the reprimand, but, as the majority below noted, she has no right by statute or rule to such review. 12a. The State Supreme Court has not yet acted upon that petition.

REASONS FOR GRANTING THE WRIT

Ten years before this action was commenced, this Court issued its opinion in NAACP v. Button, 371 U.S. 415 (1963), which announced unequivocally that this Court would protect the rights of black minority citizens to associate to "solicit" persons to bring legal action for the redress of unconstitutional racial segregation. Petitioner Koe is a black woman attorney, a native of a rural South Carolina County adjacent to the community that spawned one of the cases decided by this Court in Brown v. Board of Education, 347 U.S. 483 (1954), the landmark desegregation decision. Viewed in context, this case is simply NAACP v. Button played over again, with the ACLU undertaking the role of allegedly "soliciting" litigation on issues of public moment.

This Court should issue a writ of certiorari to review the judgment below

because it is in conflict with prior decisions of this Court, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); and NAACP v. Button, 371 U.S. 415 (1963). In addition, the judgment below extended the application of the doctrine of comity, an important issue of federal practice, in a manner unprecedented in the decisions of this Court and in conflict with the decisions of other courts of appeals.

I. The doctrine of comity does not require that federal courts defer, for the enforcement of federal constitutional rights, to administrative bar disciplinary proceedings concerning non-criminal conduct that is alleged to be "unethical."

A. The court below decided an important question of federal practice by an unprecedented and unwarranted extension of the application of the doctrine of comity.

Since the decision in Younger v. Harris, 401 U.S. 37 (1971), and its companion cases, this Court has on many occasions discussed the considerations of comity that have been held to prohibit the exercise of federal judicial power when state judicial proceedings are pending. Gibson v. Berryhill, 411 U.S. 564 (1973); Steffel v. Thompson, 415 U.S. 452 (1974); Allee v. Medrano, 416 U.S. 802 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Kugler v. Helfant, 421 U.S. 117 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Doran v. Salem Inn, Inc.,

422 U.S. 922 (1975). cf. Hernandez v. Danaher, 405 F.Supp. 757, prob. jurisdiction noted sub. nom Trainor v. Hernandez, 44 U.S.L.W. 3702 (U.S. June 7, 1976) (No. 75-1407); Juidice v. Vail, F.Supp. (S.D.N.Y. 1976), cert. granted, 44 U.S.L.W. 3734 (U.S. June 21, 1976) (No. 77-1397). To date, however, this Court has never suggested that state administrative proceedings, including disciplinary proceedings for professional misconduct were subject to the same considerations of comity unless the alleged misconduct was criminal or quasi-criminal in nature. See the opinion of Mr. Justice White for the Court in Gibson v. Berryhill, supra, 411 U.S. at 576-77, discussing this Court's summary affirmance of Geiger v. Jenkins, 401 U.S. 95 (1971), in reliance upon Younger (revocation of a license to practice medicine, where criminal proceedings were pending at time of dismissal of federal case). As the three dissenting judges noted below, 21a, 23a:

What is at stake in the state proceedings is the right of a licensee to practice her profession; there is no claim that, if the individual plaintiff did the things with which she is charged, any criminal statute of South Carolina was infringed.

* * *

Although the district court ought not to enjoin the administrative proceeding unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted

because the proceeding is criminal or quasi-criminal in nature.

There is, in fact, wholly absent in this case any effort by the State "to protect the very interests which underlie its criminal laws, and to obtain compliance with precisely the standards which are embodied in its criminal laws." Huffman v. Pursue, Ltd., supra, 420 U.S. at 605. The Supreme Court of South Carolina itself has always disclaimed any notion that disciplinary proceedings in South Carolina are criminal or even punitive. In re Kennedy, 254 S.C. 463, 176 S.E.2d 125 (1970); Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960). Petitioner Koe was not charged pursuant to Section 4(c) of the Rule on Disciplinary Procedure, which imposes sanctions for "commission of a crime involving moral turpitude." Petitioner Koe was reprimanded for violation of a Disciplinary Rule that was not mentioned in any charge or accusatory pleading until after her hearing; can the State seriously contend that a hearing using such procedures is entitled to the deference due state criminal proceedings?

In the present case, the court of appeals adopted the opinion of the district court on the Younger issue. 3a-4a, 17a. The district court did not analyze the interests involved in the South Carolina proceeding, but simply quoted at length from Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972). 39a-43a. Apparently the gist of the court's reliance on Erdmann, as applied in South Carolina, was this, 42a-43a:

Undoubtedly because of general recognition of the advisability of permitting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages. 458 F.2d at 1210.

This theory is not only totally lacking in support in prior decisions of this Court, it is also inapplicable to the factual circumstance of this case. South Carolina bar disciplinary procedure provides that a private reprimand is administered by the Board of Commissioners on Grievances and Discipline, without any opportunity for judicial hearing or any specified procedure for review by the courts. Petitioner Koe received a private reprimand on January 9, 1976. As the court of appeals noted, "... the plain language of [the state court rule] does not give Koe the right to 'appeal' the Board's finding to the South Carolina Supreme Court." 12a. If the state court does not have jurisdiction to review the reprimand at petitioner Koe's request, it is questionable whether the reprimand, a decision of a state board, can be reviewed by this Court on direct review under 28 U.S.C. § 1257, or any other jurisdictional statute. Stern & Gressman, Supreme Court Practice (4th ed. 1969), §§ 3.20, 3.24.

Therefore, the crucial predicate of the Erdmann decision -- the availability of direct appellate review -- may be wholly lacking in the factual circumstances of the present case.

Therefore, the decision below, as intimated by the court of appeals, 16a, was effectively a holding that Petitioner Koe must exhaust state administrative remedies before bringing this suit pursuant to 42 U.S.C. § 1983. Any such requirement of exhaustion of state remedies is directly in conflict with numerous prior decisions of this Court. Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); see Gibson v. Berryhill, 411 U.S. 564, 581 (1973) (Marshall, J., concurring). Cf. also Burrell v. McCray, ___ U.S. ___, 96 S.Ct. 2640 (1976). Even if exhaustion of administrative remedies were an appropriate requirement in this case, cf. Gibson v. Berryhill, supra, 411 U.S. at 574, the action of the courts below has caused it to occur, so that there is presently no bar to consideration of the matter in the district court.

- B. This Court should grant the writ of certiorari to resolve a conflict among the circuits as to the applicability of the doctrine of comity to administrative disciplinary proceedings for non-criminal conduct.

The decision below accentuates a conflict among the circuit courts of appeals as to the applicability of the doctrine of Younger v. Harris, supra, and its progeny

to state bar disciplinary proceedings when such proceedings have not been brought before a state court.

The court of appeals for the fifth circuit has held that:

...when a Grievance Committee, by administrative action, undertakes merely to upbraid a local attorney for conduct deemed to be violative of the ethical standards of the profession, as provided in the Canons of Ethics, it is not in any sense acting in aid of the enforcement of Texas' criminal laws.

Polk v. State Bar of Texas, 480 F.2d 998, 1002 (5th Cir. 1973).

Polk was also a case involving a Board which could administer a reprimand by administrative action, or could bring the matter before a state court for more severe discipline. 480 F.2d at 1001. The sixth circuit has also held, in a pre-Younger case involving a state procedure in Kentucky almost identical to that in South Carolina, that as long as the proceedings were before the State Bar Committee, and not yet referred to the state courts, the proceedings were not due the respect due to state judicial proceedings. Taylor v. Kentucky State Bar Assn., 424 F.2d 478, 482 (6th Cir. 1970).

In contrast, the court of appeals below, and the second circuit in Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975), have applied Younger because of the "interest

of the state court in adjudicating the continuing professional fitness and character of its own officers..." 515 F.2d at 432. However, the court below is the only circuit court to apply Younger to administrative board or committee proceedings on an alleged technical violation of professional ethics by conduct that was clearly altruistic; the conduct at issue in Anonymous was allegedly criminal conduct for which the attorney had been granted immunity from criminal prosecution in order to obtain his testimony before a state grand jury. (In Erdmann v Stevens, supra, the second circuit applied Younger to a non-criminal alleged ethical violation that was being heard in the state courts, not before a board or committee.)

II. The decision below is in conflict with prior decisions of this Court concerning standing to seek declaratory relief on behalf of an organization, regardless of proceedings pending against others.

The decision below is squarely in conflict with this Court's decision in Steffel v. Thompson, 415 U.S. 452 (1974) and NAACP v. Button, 371 U.S. 415 (1963), in denying the Petitioner American Civil Liberties Union the opportunity to litigate its claims for declaratory relief from the policy set out by the Board of Commissioners on Grievances and Discipline, on behalf both of the organization itself and of those of its attorney members who have not been the subject of professional disciplinary proceedings.

In NAACP v. Button, supra, this Court dealt squarely with the question of the legal standing of an organization similar

to Petitioner ACLU to assert First Amendment rights of association. The words of this Court then are equally applicable now, 371 U.S. at 428:

...petitioner claims that the [statute] infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. (Emphasis added.)

The court of appeals below entirely missed the gist of this principle, stating, 6a-7a:

...the ACLU clearly has no independent standing to challenge state disciplinary proceedings since no disciplinary proceedings can be brought against the ACLU itself.

However, the complaint in this action had alleged the following independent interest of the ACLU in the proceedings (paragraphs 12 and 13):

The ACLU has in the past and intends in the future to educate laypersons to recognize their problems, to facilitate the

process of intelligent selection of lawyers, and to assist in making legal services fully available.

* * *

[The disciplinary] complaint has the effect of ...chilling and discouraging the activities of the ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain counsel or take legal action. (Emphasis added.)

What logic is there in holding that proceedings pending against one member of an organization deprives the organization and all its members of an opportunity to seek prompt relief in a federal forum? In Dombrowski v. Pfister, 380 U.S. 479, 486 (1965), this Court noted that

"[t]he threat of sanctions may deter...almost as potently as the actual application of sanctions...." ...Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overboard regulations risk prosecution to test their rights. For free expression--of transcendent value to all society, and not merely to those exercising their rights--might be the loser.

See also NAACP v. Button, supra, 371 U.S. at 434-35. In the instant case, the effect

of the federal court's action in staying its hand has been to deter ACLU attorneys in South Carolina, for almost two years, from offering to provide free representation to uneducated laypersons who are ignorant of their potential rights to judicial relief. Such activity is clearly protected under the First Amendment. NAACP v Button, supra; United Transportation Union v. Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964). See dissenting opinion below, 24a-25a.

The decision below is further in conflict with Steffel v. Thompson, supra. In Steffel, the plaintiff, who had not been arrested, and his co-plaintiff, who had been prosecuted, had jointly engaged in distributing anti-war literature. The prosecution of the co-plaintiff, whose federal suit was dismissed, was voluntarily stayed pending the decision of Steffel's federal action. The practical effect of granting declaratory relief to Steffel was clear and immediate: if the statute were declared unconstitutionally applied to him, his handbilling companion would undoubtedly be freed from further prosecution. See also Roe v. Wade, 410 U.S. 113, 125-27 (1973), discussed in Steffel v. Thompson, supra, 415 U.S. at 471 n.19. In Steffel, this Court also cited with approval two court of appeals decisions in which state prosecutions were pending against certain persons, yet class actions were held to be maintainable on behalf of the class of persons threatened with proceedings but not presently subject to pending proceedings. Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973); Lewis v. Kugler, 446 F.2d 1343, 1349 (3d Cir. 1971). See Steffel v. Thompson, supra, 415 U.S. at 458 n.8. More recently,

this Court has recognized the same practical possibility in Doran v. Salem Inn, Inc., supra.

Indeed, a forum for Petitioner ACLU was mandated by the fact that "no disciplinary proceedings can be brought against the ACLU itself." An affirmative lawsuit is the only way in which the ACLU can assert its organizational interests in the protected activity of offering free, unsolicited representation to laypersons.

III. The decision below is directly in conflict with decisions of this Court defining exceptions to the bar to the exercise of federal jurisdiction imposed by the doctrine of comity.

The decision below is also in conflict with the meaning attached to the irreparable injury requirement stated in Younger v. Harris, supra, as discussed in subsequent cases, such as Huffman v. Pursue, Ltd., supra. This Court has stated that even where there are pending state proceedings, entitled to respect under the doctrine of comity relied upon in Younger, the doctrine does

...allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith or where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions...." (Emphasis added.) Huffman v. Pursue, Ltd., supra, 420 U.S. at 611.

Thus, there are three separate exceptions to Younger: (1) a prosecution for purposes of harassment; (2) a prosecution conducted in bad faith, "without any hope of ultimate success, but only to discourage" constitutionally protected activity, Dombrowski v. Pfister, supra, 380 U.S. at 490; or (3) a prosecution under a statute "flagrantly and patently violative of express constitutional prohibitions." Petitioners alleged all of these exceptions to the doctrine of comity. The district court's opinion, adopted on these points by the court of appeals, recognized that exceptions had been sufficiently alleged, but held that irreparable injury could not be shown unless there were no "reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised." 41a. This additional requirement flies directly in the face of this Court's decision in Huffman, decided in the interim between the decision of the district court and the decision of the court of appeals. In Huffman, this Court expressly required that state appellate processes be exhausted, "unless [the federal plaintiff] established that early intervention was justified under one of the exceptions recognized in Younger." (Emphasis added.) 420 U.S. at 611. Indeed, the idea that proceedings have been brought "without any hope of ultimate success" contemplates that the appropriate state judicial officers will properly guard the federal plaintiff's rights, but this Court's decisions have established that where such prosecutorial bad faith is shown, the federal plaintiff need not wait upon state court proceedings for vindication. See opinion of Judge Winter below, 21a, footnote.

This Court has further recognized an important exception to the Younger doctrine

in the class of statutes that are "flagrantly and patently violative of express constitutional prohibitions." The doctrines of vagueness and overbreadth are well developed in the jurisprudence of this Court. Hynes v. Mayor of Oradell, U.S., 96 S.Ct. 1755 (1976); Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, supra. The present proceeding was initiated on a complaint charging that Koe's conduct was punishable as an "act ... or ... practice which tends to pollute the administration of justice or to bring the legal profession or the courts into disrepute." Although the Supreme Court Rule on which this complaint was based was enacted almost twenty years ago, it has never been authoritatively construed by the South Carolina Supreme Court in a manner to limit its application to avoid punishment of protected activity. In fact, the reprimand issued by the Board of Commissioners reflects a total disregard for the decisions of this Court, in purporting to impose discipline for conduct indistinguishable from that held protected by this Court in NAACP v. Button, supra, on behalf of an organization specifically mentioned in Button as one whose activities were protected. 371 U.S. at 440, n. 19.⁴

4. The Board purported to find Koe's conduct unprotected because an associate, with whom she shares office expenses, receives compensation from the ACLU, and the ACLU asks for attorneys fees in cases where such may properly be awarded according to law. But in NAACP v. Button, supra, the Court's opinion extended to the protection of staff attorneys of the NAACP and the Defense Fund, 371 U.S. at 420-21, 429 n. 11, (footnote continued to next page)

In the present case, the federal plaintiffs are still waiting, almost two years later, and the state procedures have not yet brought the complaint before any court. The chilling effect on the ACLU and its associated attorneys continues unabated. The petitioners sufficiently alleged exceptions to the Younger doctrine to justify relief. These allegations must be accepted as true at this stage of the litigation. Jenkins v. McKeithan, 395 U.S. 411, 421-22 (1969); Gardner v. Toilet Goods Assn., 387 U.S. 167, 172 (1967); United States v. Mississippi, 380 U.S. 128, 143 (1965); Cooper v. Pate, 378 U.S. 546 (1964); Conley v. Gibson, 355 U.S. 41 (1957). Therefore, it was patently erroneous for the district court to dismiss this action in reliance upon Younger v. Harris.

(footnote 4 continued from preceding page)

434-35, 438-44, although the record clearly showed that they were compensated for their professional efforts in "solicited" cases, supra at 420, and the Supreme Court of Appeals of Virginia had found the state to be justified in preventing "fomenting and soliciting legal business.... which they channel to the enrichment of certain lawyers employed by them." 371 U.S. at 426.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1335

American Civil Liberties Union and Jane Koe,
Appellants,

versus

O. Harry Bozardt, Jr., H. Hayne Crum, Joseph
O. Rogers, Jr., Marion H. Kinon, Edward M.
Royall, II, George F. Coleman, Robert A.
Hammett, Thomas J. Thompson, Coming B. Gibbs,
Jr., Lowell W. Ross, Frank E. Harrison, J.
Malcolm McLendon, C. Thomas Wyche, William
L. Bethea, John B. McCutcheon, Melvin B.
McKeown, Jr., individually and as members of
the Board of Commissioners on Grievances and
Discipline, and their successors; and the
Attorney General of South Carolina,

Appellees.

Appeal from the United States District Court
for the District of South Carolina, Columbia
Division. Robert F. Chapman, District Judge.

Argued October 9, 1975. Decided Mar. 8, 1976.

Before BOREMAN and BRYAN, Senior Circuit Judges,
and FIELD, Circuit Judge

BOREMAN, Senior Circuit Judge:

One of the appellants, pursuing this action under the fictitious name Jane Koe, is an attorney licensed to practice law in South Carolina who performs legal services for the other appellant, the American Civil Liberties Union (hereinafter the ACLU). Koe and the ACLU seek federal equitable relief blocking state disciplinary proceedings initiated against Koe by the Board of Commissioners on Grievances and Discipline of the South Carolina Bar (hereinafter the Board). They contend that the Board's investigation of a complaint filed against Koe charging her with professional misconduct violates rights guaranteed by the first and fourteenth amendments to the Constitution of the United States and 42 U.S.C. §1983.

This action arose as a result of a complaint filed with the Board charging that Koe, by writing a letter to a prospective client offering the legal services of the

ACLU, performed acts which constituted solicitation and violated the Canons of Ethics adopted by the South Carolina Supreme Court. Koe contends that since her services for the ACLU are rendered without fee, she has not violated the Canons of Ethics, and that the investigation of the complaint by the Board and the Attorney General of South Carolina amounts to bad faith harassment intended to discourage the activity of the ACLU. Koe and the ACLU initiated this action in the federal district court seeking declaratory and injunctive relief preventing the Board from prosecuting or otherwise processing both the complaint filed against Koe and similar future complaint which may be filed against other ACLU attorneys. The Board moved for dismissal of the action. The district court, in a well reasoned opinion, granted the Board's motion to dismiss on the ground that federal relief was barred under

the principles set forth in Younger v. Harris, 401 U.S. 37 (1971), as applied by the Second Circuit in Erdmann v. Stevens, 458 F.2d 1205 (2 Cir.), cert. denied, 409 U.S. 889 (1972).

On appeal, Koe and the ACLU contend that even if Younger is a bar to the relief requested, the district court should have abstained and retained jurisdiction rather than dismissing the federal complaint. We find no merit in this argument. Abstention is generally held to be appropriate in cases in which both state and federal questions arise, and it is recognized that an action pending in state court will likely resolve state law questions which are dispositive of the federal claim. Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975). However, the Younger bar to federal intervention involves different considerations; it is recognized that when both state and federal questions are properly presented before a

state court in pending state criminal proceedings, see Younger, supra, or in certain pending state civil proceedings, see Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), principles of comity and federalism require that the federal courts not be permitted to interfere in the ongoing state proceedings. The underlying consideration of the Younger rule is the recognition that any federal claim properly asserted in and rejected by the state court is subject to review by the United States Supreme Court. 420 U.S. at 605. Since the federal claim will eventually be subject to consideration by the Supreme Court, abstention appears to have no application to cases in which Younger bars relief. In this regard, the Supreme Court has stated that "[u]nlike those situations where a federal court merely abstains from decision on federal questions until the resolution of underlying state issues... Younger v. Harris contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and

federal, to the state courts." Gibson v. Berryhill, 411 U.S. 564, 577 (1973). We are not aware of any authority which suggests that dismissal is inappropriate in cases in which Younger bars federal intervention, and the appellants have cited no cases which support such a position. Thus, we conclude that dismissal was appropriate upon the court's determination that Younger was a bar to federal intervention.

The ACLU further contends that even if dismissal of Koe's complaint was appropriate under Younger, dismissal of the ACLU's complaint was improper because there was no state proceeding pending directly against it. Although the district court opinion does not assign specific reasons for dismissal as to the ACLU, we conclude that the ACLU's complaint was properly dismissed.

In the instant case, the ACLU clearly has no independent standing to challenge

state disciplinary proceedings since no disciplinary proceedings can be brought against the ACLU itself. However, in Allee v. Medrano, 416 U.S. 802 (1974), the Court recognized that a labor union has standing as a named plaintiff to raise any claims that one of its members would have standing to raise under 42 U.S.C. §1983, if the union was in a position to suffer real injury derivatively when there was infringement upon the first amendment rights of its members. The ACLU contends that under Allee it has derivative standing in the instant case, but we find it unnecessary to reach this question since, even if the ACLU has standing, the relief sought by the ACLU would be barred by Younger v. Harris.

If the ACLU were found to have standing to assert rights of its associated attorneys derivatively, and this standing was asserted only on the basis of the injury to Koe, it is clear that the organization's action for

equitable relief would be subject to the same restrictions as Koe's action, since its rights would be derived entirely from Koe's rights. The ACLU contends, however, that it is also asserting rights of associated attorneys other than Koe who have no state proceedings pending against them, and are not burdened by the Younger restrictions. Since its other associated attorneys would not be subject to the Younger restrictions in a suit for federal equitable relief, the ACLU claims that it should not be subject to Younger. We reject this contention. The Supreme Court has held that persons not presently subjected to state proceedings may seek declaratory relief with respect to threatened prosecutions without meeting the requirements of Younger. Steffel v. Thompson, 415 U.S. 452 (1974). In Steffel, however, declaratory relief was sought by an individual; thus any federal equitable relief

which he received would affect only subsequent state proceedings initiated against him. In the present case, because federal equitable relief is sought by the ACLU on behalf of its members, a grant of federal relief would necessarily have an effect upon all ACLU associates, including Koe. To permit the ACLU to assert rights to those associates not bound by the Younger restrictions in order to obtain federal equitable relief which would necessarily benefit all its associates would directly interfere with the pending state proceedings, and have the effect of circumventing the Younger restrictions which bar Koe from seeking direct federal relief. We conclude that Allee and Steffel were not intended to be interpreted so as to permit a litigant to avoid Younger restrictions merely by joining his claim with claims of others asserting a joint interest.

After argument was heard on this appeal, Koe and the ACLU moved this court to remand their case to the district court, contending that action taken by the Board terminated the disciplinary proceedings against Koe and removed the necessity for federal "abstention." Because the district court did not "abstain," but rather dismissed the federal complaint on ground that Younger barred relief, we view this as a motion to remand on the ground that the Board's action removed the Younger bar to federal intervention.

In this motion to remand, Koe and the ACLU allege that after this appeal was filed the investigating panel recommended that Koe be given a "private reprimand" which was administered by the Board on January 9, 1976.¹

1. At oral argument Koe's counsel tendered documents to the court which he represented to be copies of the investigating panel's confidential report and recommendation. The Board's counsel objected and we ordered these documents sealed and retained by the clerk pending our determination of what action [footnote continued to next page]

They argue that because the administration of the "private reprimand" has the effect of ending the state disciplinary proceeding and no "appeal" is provided to the state courts from this "private reprimand," the Younger considerations of comity and federalism which barred the district court from considering the case no longer exist. The Board counters this argument by asserting that because section 34 of the South Carolina Supreme Court's Rule on Disciplinary Procedure recognizes that court's authority to require certification to it of the record in any disciplinary proceeding "for such action as it deems proper," there has been no final state determination in these disciplinary

[footnote 1 continued from preceding page]

should be taken with respect thereto. Having concluded that the report could not affect this decision, we direct that the sealed documents be returned to appellant's counsel.

proceedings.² The Board argues further that since Koe may still seek certification for review from the state Supreme Court, she has not exhausted her state remedies, and that Younger continues to bar federal intervention.

We think that the plain language of section 34 does not give Koe the right to "appeal" the Board's finding to the South Carolina Supreme Court. This recently adopted section serves only to bolster earlier interpretations by the South Carolina Supreme Court holding that it has the ultimate responsibility to resolve all disciplinary proceedings. We find section 34 entirely consistent with prior judicial pronouncements of that court

2. Section 34 of the South Carolina Supreme Court's Rule on Disciplinary Procedure, as amended June 12, 1975, states:

Nothing in these rules shall be construed to deprive the Supreme Court of the authority to require the certification to it of the record in any case, for such action as it deems proper.

that

[the members of the Board are] commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members of the bar of this State and of reporting to this court the proceedings of their inquiry, and their findings and recommendations; that the Board's report is advisory only, this court being in nowise bound to accept its findings of fact or to concur in its recommendations; and upon this court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.

Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960).

Koe's argument appears to be based upon her interpretation of the provisions of section 11 of the Rule on Disciplinary procedure, which states that, upon a finding by the Board that the attorney is guilty of misconduct, the Board may administer a "private reprimand."³ Since there is no

3. Section 11 of the South Carolina Supreme Court's Rule on Disciplinary Procedure, as amended June 12, 1975, states, in pertinent [footnote continued to next page]

provision in any other section of the South Carolina Supreme Court's Rule on Disciplinary Procedure under which one who is subjected to a "private reprimand" may obtain a review by

[footnote 3 continued from preceding page]

part:

Upon consideration of the report of the panel, and the showing made to the Board, the Board of Commissioners may:

- (a) Refer the matter back to the panel for further hearing; or
- (b) Order a further hearing before the said Board of Commissioners; or
- (c) Proceed upon the certified report of the prior proceedings before the panel.

Upon its final review, the Board of Commissioners may either dismiss the complaint or find that the respondent is guilty of misconduct. If the Board shall determine that a private reprimand shall be administered, it shall administer such reprimand. If the complaint is dismissed or if a private reprimand is administered, the Secretary of the Board of Commissioners shall thereupon so notify the respondent, the complainant, all counsel of record, and, when deemed appropriate, and requested in writing by the respondent, the local Bar Association

that court, Koe contends that the Board's administration of a "private reprimand" has the effect of rendering final judgment on her case. If section 11 is interpreted as Koe urges, there appears to be an ambiguity between it and section 34, which clearly recognizes the power of the highest state court to review the Board's findings in any proceeding. We find, however, that the provisions of the Rule may be read without conflict if the "findings" of the Board are always considered advisory. Our reading of both Burns, supra, and section 34 convinces us that even a "private reprimand" administered under section 11 is to be considered merely advisory until sustained or acquiesced in by the state Supreme Court. Thus, we conclude that there is no final state determination in any disciplinary proceeding until such time as the South Carolina Supreme Court indicates, expressly or by implication, that the Board's findings will either be rejected or permitted to stand.

Koe's state remedies are not exhausted until such time as the disciplinary proceedings become final and, until her state remedies are exhausted Younger v. Harris bars both Koe and the ACLU from seeking equitable relief.⁴ Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In the present case, a final state adjudication of the disciplinary proceedings will not occur until it can be demonstrated that the South Carolina Supreme Court has either expressly decided the question or acquiesced in the decision of the Board.⁵ Since Koe and the ACLU have shown neither of the above, the motion to remand is denied.

4. We do not reach the question in the present case as to whether either Koe or the ACLU may renew the action for federal equitable relief if the Board's interpretation of the Canons of Ethics is sustained by the state Supreme Court. Thus, we express no opinion as to what relief would be appropriate under those circumstances.

5. We suggest that if the South Carolina Supreme Court should fail to certify Koe's case upon its own motion as permitted by section 34, Koe may obtain finality by requesting review [footnote continued to next page]

We affirm the holding of the district court that Younger v. Harris bars federal intervention in these state disciplinary proceedings, for the reasons stated in the district court's opinion, ___ F.Supp. ___ (D.S.C. 1974), and as amplified herein.

Affirmed

[footnote 5 continued from preceding page]

by that court. If review is denied or no action is taken within a reasonable period, this would have the effect of affirming the Board's findings.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1335

[Filed April
30, 1976]

American Civil Liberties
Union and Jane Koe,

Appellants,

versus

O. Harry Bozardt, Jr., H. Hayne
Drum, Joseph O. Rogers, Jr.,
Marion H. Kinon, Edward M. Royall, II,
George F. Coleman, Robert A. Hammett,
Thomas J. Thompson, Conning B. Gibbs, Jr.,
Lowell W. Ross, Frank E. Harrison, J.
Malcolm McLendon, C. Thomas Wyche,
William L. Bethea, John B. McCutcheon,
Melvin B. McKeown, Jr., individually
and as members of the Board of Commis-
sioners on Grievances and Discipline,
and their successors; and the Attorney
General of South Carolina,

Appellees.

O R D E R

Upon consideration of the petition for re-
hearing it is ORDERED, with the consent and
approval of Judge Bryan and Judge Field, that the
petition for rehearing be and the same hereby is
denied.

Upon consideration of the suggestion for a
rehearing in banc, a poll of the court having
been requested by a regular active member of

the court, it was established that a majority of the regular members of the court in active service did not favor rehearing in banc,

NOW, THEREFORE, IT IS ORDERED that the suggested rehearing in banc be and the same hereby is denied.

For the court:

s/ Herbert S. Boreman
Senior United States
Circuit Judge.

WINTER, Circuit Judge, dissenting:

I dissent from the denial of rehearing in banc.

This is a classic case for such treatment. It presents a question of exceptional importance, Rule 35(a), F.R.A.P., and there is substantial reason to conclude that the case is wrongly decided.

I.

The panel holds that the principles set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, oust federal jurisdiction of an action under 42 U.S.C. § 1983 for declaratory and injunctive relief where there is pending a state administrative proceeding, the object of which is to determine if the individual plaintiff should be subjected to disciplinary action, not criminal sanctions, for alleged misconduct as a member of the

bar.* What is at stake in the state proceedings is the right of a licensee to practice her profession; there is no claim that, if the individual plaintiff did the things with which she is charged, any criminal statute of South Carolina was infringed.

Under presently decided controlling authorities, the outermost reach of the Younger principle of federal non-intervention was Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which held that a district court should not exercise jurisdiction to determine the constitutionality of a statute making a

* At the outset, I express serious reservations that even if Younger applies, it would support the result reached by the majority. Younger appears to recognize that it is inapplicable where a plaintiff shows "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54. The complaint was dismissed notwithstanding plaintiffs' allegations that the disciplinary inquiry "was initiated against plaintiff Koe in bad faith for purposes of, and has the effect of, harassment and retaliation and chilling and discouraging the activities of ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain counsel or take legal action."

movie theatre which shows obscene films a nuisance and requiring its closing when there was pending an earlier filed state civil proceeding under the statute. Huffman recognized federal civil injunctive relief ought to be more conservatively granted when the object of relief was a state officer enforcing a state statute than in a case between private litigants--a concept implicit in Younger--but that Younger rested also "upon the traditional reluctance of courts of equity . . . to interfere with a criminal prosecution." 420 U.S. at 604. Thus, the rationale articulated in Huffman was that

[W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding ... while in

this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws. 420 U.S. 604-05.

Huffman does not govern this case, and Younger should not be applied here. Although the district court ought not to enjoin the administrative proceeding unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted because the proceeding is criminal or quasi-criminal in nature. I think that the panel's decision flies in the teeth of Mitchum v. Foster, 407 U.S. 225 (1972) (holding that an action under 42 U.S.C. § 1983 was an exception to the anti-injunction statute, 28 U.S.C. § 2283); Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that a federal court could enjoin a proceeding before the Alabama Board of Optometry where, as here, plaintiffs allege bias and harassment); and

Steffel v. Thompson, 415 U.S. 452 (1974) (holding that declaratory relief, such as that prayed here, could be granted where a state criminal prosecution was threatened but not pending.) See also Taylor v. Kentucky State Bar Assoc., 424 F.2d 478, 482 (6 Cir. 1970) (holding that bar disciplinary proceedings at the administrative level are not "proceedings in a state court.")

II.

Only the individual plaintiff is the subject of the state administrative inquiry; the ACLU is not. Yet the latter has a substantial interest in the state proceedings. The impact of the state proceedings on the willingness of lawyers to volunteer and cooperate with ACLU in providing legal assistance to those whose constitutional rights have been violated is manifest. The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available-- are the very services for which the

individual plaintiff is sought to be disciplined and they are constitutionally protected activities. *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). See *In re Ades*, 6 F.S. 467, 475-76 (D. Md. 1934), for a persuasive historical compilation by a district judge, later a distinguished member of this court.

It seems to me that under these circumstances Steffel holds that even if Younger is a bar to jurisdiction over the claim of the individual plaintiff, the claim of ACLU can and should be litigated. See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

III.

Thus, I would conclude that for these several reasons the panel's decision is incorrect. We should grant rehearing in

banc and reach a different result.

Judge Craven and Judge Butzner authorize me to say that they join in these views.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

American Civil Liberties)	
Union and Jane Koe,)	
)	Civil Action
Plaintiffs,)	No. 74-1703
)	
vs.)	
)	O R D E R
O. Harry Bozardt, Jr.,)	
H. Hayne Crum, Joseph O.)	
Rogers, Jr., Marion H.)	
Kinon, Edward M. Royall,)	
II, George F. Coleman,)	
Robert A. Hammett, Thomas)	
J. Thompson, Coming B.)	
Gibbs, Jr., Lowell W. Ross,)	
Frank E. Harrison, J.)	
Malcolm McLendon, C. Thomas)	
Wyche, William L. Bethea,)	
John B. McCutcheon, Melvin)	
B. McKeown, Jr., individually)	
and as members of the Board)	
of Commissioners on Grievances)	
and Discipline, and their)	
successors; and the Attorney)	
General of South Carolina,)	
)	
Defendants.)	

This action is brought by American Civil Liberties Union, hereinafter referred to as ACLU, and Jane Koe, hereinafter referred to as Koe, who is a practicing attorney in Richland County, South Carolina, and is using the fictitious name of Jane Koe to protect

her privacy and professional reputation. The plaintiffs ask this Court to enjoin the Attorney General of South Carolina and the members of the Board of Commissioners on Grievances and Discipline, hereafter referred to as Board, who are appointed and elected pursuant to the Rule for Disciplinary Procedure of the South Carolina Supreme Court. The complaint also seeks costs, plus attorneys' fees and a declaration by the Court that the pending complaint against Koe before the Board is in violation of her rights under the First and Fourteenth Amendments to the Constitution of the United States.

The defendants have moved to dismiss the action on five separate grounds, but since the dismissal will be granted, it is necessary to discuss only the grounds supporting dismissal.

On October 10, 1974, Koe received a notice and a complaint from the secretary

of the Board, which complaint alleges on information and belief that Koe committed an act of misconduct as an attorney by writing a letter dated August 30, 1973, to an individual in Aiken, South Carolina, which the secretary of the Board considered to be a solicitation in violation of the Canons of Ethics. The complaint prays "that the Board of Commissioners on Grievances and Discipline consider these allegations and make such disposition as may be appropriate."

Koe contends that since she is associated with the ACLU as a cooperating attorney, is an officer of the South Carolina affiliate of the ACLU and serves in both capacities without fee or pay or any expectation thereof and since she had no financial interest or expectation of gain or reward in connection with the correspondence or any representation that may have been produced thereby, she is not guilty of violating any of the Canons of Ethics and the action of the Board amounts

to harassment, was taken in bad faith and for the purposes of chilling and discouraging the activities of the ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain legal counsel or take legal action, when their rights are being violated or threatened with violation.

The complaint alleges in part:

"7. Prior to August 30, 1973, plaintiff Koe was contacted by a Mr. Gary Allen, of whom she had prior knowledge and knew to be acting on behalf of a Mrs. M.W. with apparent and actual authority to so act. He requested that plaintiff Koe or the ACLU undertake to represent Mrs. M.W. in an action against certain persons who procured, performed, or authorized her sterilization. In response to such request, she wrote Mrs. M.W. on August 30, 1973, stating the willingness of the ACLU to undertake to secure her representation.

8. Plaintiff Koe talked thereafter with Mrs. M.W. on several occasions about her proposed law suit. However, Mrs. M.W. elected not to proceed with litigation and plaintiff Koe's involvement with her was terminated. Other women residing in Aiken, South Carolina, however, who had been sterilized or threatened with sterilization, elected to proceed with

litigation and filed a damage action through lawyers associated with the ACLU, in Doe v. Pierce, Civ. No. 74-475, D.S.C. Plaintiff Koe does not represent any of the parties in Doe v. Pierce, nor has she any direct involvement in that case.

9. Upon information and belief, attorneys representing some of the defendants in Doe v. Pierce secured a copy of the August 30, 1973, letter from plaintiff Koe to Mrs. M.W. and attempted to raise as a defense in that suit that the action was barred or rendered unlawful because of solicitation. On September 24, 1974, during the deposing of one of the plaintiffs in Doe v. Pierce, Honorable Sol Blatt, Jr., who had knowledge of the August 30, 1973, letter, permitted certain questions to be propounded to that witness involving her contacts with plaintiff Koe, but solely as to the issue of the appropriateness of the suit as a class action. The court ruled that plaintiff Koe had not committed solicitation as follows:

Judge Blatt: All right, now let the record show that the other question presented to the Court was the question pertaining to this witness as to how she came to meet or to know [Jane Koe] and so this record will be clear and recognize that the Court may clear it some that this question probably goes to the issue of solicitation. This Court feels in its posture of the American Civil Liberties Union has a duty

and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACLU, in contacting if that in fact did happen, the plaintiffs but the Court feels that the issue of contact or solicitation does go to the question of validity or the appropriateness of a class action. Because of that and only because of that this Court feels that it is an appropriate question to ask this plaintiff."

Plaintiffs allege that the above mentioned "ruling" of Judge Blatt involving the alleged solicitation by plaintiff Koe was withheld from the Board by the Attorney General of South Carolina or his attorneys at the time the complaint was initiated.

The letter from plaintiff Koe to Mrs. M.W. contained the following paragraph:

"You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed

the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on."

The Board contends that this paragraph constitutes a solicitation in violation of the Canons of Ethics. This is the charge Koe is called upon to answer before the Board.

The above letter was dated August 30, 1973. The letterhead showed "Carolina Community Law Firm" with a Columbia address. The names of four attorneys were listed on the letterhead and Koe signed the letter as "Attorney-at-Law". Although the above quoted paragraph mentions ACLU, there is no indication in the letter that Koe is acting on behalf of the ACLU, is an officer, employee, cooperating attorney or in any way connected with ACLU.

The Supreme Court of South Carolina has adopted a "Rule on Disciplinary Procedure" pursuant to its authority to discipline, suspend and disbar attorneys at law. The

South Carolina Constitution Article V.,
Section 4 and South Carolina Code of Laws
(1962) §56-96.

The defendants, except the Attorney General of South Carolina, are the duly appointed and acting members of the Board of Commissioners on Grievances and Discipline appointed by the South Carolina Supreme Court for the purpose of investigating and making recommendations to the Court in disciplinary actions as provided by the aforementioned rule. The duties and responsibilities of the Board have been expressed by the Court in Burns v. Clayton, 237 S.C. 316, 177 SE 2d 300 (1960) as follows:

" . . . The Board of Commissioners on Grievances and Discipline are officers of this Court, commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members at the Bar of this State and of reporting to this Court the proceedings of their inquiry, and their findings and recommendations The Board's report is advisory only, this Court being in no wise bound to accept its recommendation; and upon this

Court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate and disciplinary action thereabout."

The Rule on Disciplinary Procedure provides that unless a complaint filed with the Board does not on its face state facts sufficient to charge misconduct, the secretary of the Board shall cause a copy of the complaint together with a notice to be mailed to the attorney charged. The attorney then has 20 days within which to file an answer to the complaint. After filing of the answer a formal hearing is held upon reasonable notice to the complainant and the attorney before a panel of three commissioners appointed by the chairman of the Board. No member of the panel may be a resident of the judicial circuit in which the complaint originated or the judicial circuit in which the respondent resides. The rules also provide the chairman of the Board may request

the Attorney General's office to handle prosecution of a claim before the hearing panel.

The attorney charged in the complaint has the right to appear, be represented by an attorney of his choosing, present witnesses and evidence, testify himself, cross examine the complaint and complainant witnesses and due process is observed.

If the panel finds the attorney guilty of misconduct warranting only private reprimand, the panel administers such reprimand. However, if the panel finds misconduct meriting public reprimand, indefinite suspension or permanent disbarment, the recommendation goes to the full Board which shall hear the matter after due notice to the parties and the submission of briefs and the presentation of oral argument in opposition to the recommendations of the panel. If the Board concurs in the finding of misconduct and the administering of discipline of more than

private reprimand, the matter is then referred to the Supreme Court of South Carolina and the respondent attorney is again given the opportunity to be heard. Until the proceedings are filed in the Supreme Court they are private, not open to the press or the public, unless the respondent requests in writing that they be made public.

Subsequent to receiving the notice and complaint from the Board, Koe and the ACLU filed the present action to enjoin the proceedings, and no further steps have been taken by the Board awaiting the disposition of the motion to dismiss the present suit.

In opposition to the defendant's motion to dismiss, plaintiffs have filed a 35 page brief, citing 154 different decisions, together with 13 pages of attachments to the brief. For all of this effort, plaintiffs do not distinguish their suit from the holding of the Second Circuit in Erdmann v. Stevens, 458 F.2d 1205 (1972). Little or

no effort was made by the plaintiff to advise this Court of why it should not apply Erdmann, and no suggestions have been made as to how this Court can ignore it. The Erdmann case is so similar in applicable law and its reasoning is so sound and persuasive, that it answers every question or position raised by the plaintiff, except the rather weak argument of res judicata and collateral estoppel.

Erdmann was an attorney practicing in New York and brought his suit to enjoin the conduct of disciplinary proceedings against him by members of the Appellate Division, First Department, of the State of New York. The disciplinary proceedings arose out of remarks made by the attorney in a magazine article highly critical of the judges of the New York courts. He asserted that the purpose of the disciplinary proceeding was to discourage and prevent his exercise of his first amendment rights and that the same violated his rights to equal protection and due

process. These are the basic claims of Koe and the ACLU in the present action.

Erdmann attempted to enjoin the judges of the court after they had refused to accept the recommendation of the Committee on Grievances of the Association of the Bar of the City of New York. The present plaintiffs attempt to enjoin the proceedings even before they are heard by the Board. In refusing the injunction and dismissing the action the Second Circuit wisely applied Younger v. Harris, 401 U.S. 37 (1971), and this Court must do the same.

It is rare to find a decision of another court which is so helpful.

After finding it had jurisdiction in the action, the Erdmann court stated at page 1208:

"The principal issue is whether, in view of the policy expressed by the Supreme Court recently in the sextet of cases headed by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), (footnote with names of other five cases omitted) Erdmann's

complaint and supporting papers state facts entitling him to injunctive relief. In Younger, the Supreme Court denied federal injunctive relief against a pending state criminal prosecution and held that because of the strong policy in favor of 'the notion of "comity," that is a proper respect for state functions' and the Constitution's creation of a system in which the sensitivity of both state and federal courts must be recognized and balanced, such intervention should be permitted only under extraordinary circumstances, such as where the state proceedings have been instituted or prosecuted in bad faith or as part of a campaign of harassment which, unless restrained, would cause grave and irreparable injury without providing any reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised. See, e.g. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). In thus reaffirming the long-established policy against federal intervention, see Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L. Ed. 138 (1951); Cleary v. Bolger, 371 U.S. 392, 83 S.Ct. 385, 9 L.Ed.2d 390 (1963), it was recognized that unless intervention were severely restricted, alert counsel would resort to federal relief as a readily available means of disrupting or subverting legitimate state prosecutions in which constitutional issues could

be resolved by competent state trial and appellate tribunals."

Although Koe alleges bad faith and harassment in the complaint, this is not sufficient, since under Younger, she must also show that unless restrained the proceedings "would cause grave and irreparable injury without providing any reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised." In discussing irreparable damage at page 1210, Erdmann states:

"The Appellate Division's institution of disciplinary proceedings against him admittedly represents the exercise of a function exclusively vested in it and falls far short of the Dombroski -type campaign of harassment and 'official lawlessness' described by the Supreme Court in Younger as the kind of exceptional or extraordinary circumstances warranting federal intervention. Furthermore, there is an absence of any evidence of irreparable injury of the type warranting relief under Younger, which requires proof of injury substantially in excess of that normally considered sufficient to invoke equitable relief. In

noting that to justify federal relief against a state prosecution the injury must be 'both great and immediate,' Justice Black there stated:

'Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.' (citation omitted).

The injury alleged here is no more than that incidental to any single prosecution of a quasi-criminal nature. There is no reason to assume that Erdmann's constitutional rights will not be protected by the Appellate Division, Third Department, to which the disciplinary proceedings against him have been transferred for adjudication, or, if further review becomes necessary, by the New York Court of Appeals. The competency of New York state courts to decide questions arising under the federal Constitution, by which we are all governed, is beyond question. In the unlikely event that both of these state appellate courts apply improper standards, Erdmann could seek Supreme Court review by petition for writ of certiorari. Undoubtedly because of general recognition of the advisability of permitting

state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages. See, e.g., Schwartz v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); Spevack v. Klein, supra; Matter of Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963)."

This Court cannot follow the plaintiffs' contention that Judge Blatt in his comments quoted above from Doe v. Pierce, decided the issue of solicitation in such a manner that it has become res judicata or acts as a collateral estoppel binding upon either the Board or the Supreme Court of South Carolina.

The recipient [sic] of the letter from Koe was not a party to that case. Plaintiff

Koe did not represent any party [to sic] that action and was not directly involved therein. There is no indication that she was questioned by the attorneys or by Judge Blatt. Certainly the Judge was not conducting a hearing as to possible disciplinary actions at the time he made his statement, which makes it clear that he was allowing questions as to solicitation, solely because it might go to the issue of the validity or appropriateness of the class action.

A United States District Judge sitting alone could not bind the South Carolina Supreme Court on what disciplinary inquiry it might make into the affairs of an attorney admitted to practice in South Carolina by the South Carolina Supreme Court, and subject to the Canons of Ethics adopted by that court. This is particularly true where the issue of solicitation is raised collaterally to the matter before the

Federal Judge. See Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967), at page 625:

"A Federal District Court has no original jurisdiction of a proceeding disbaring an attorney from practice in state courts, though in the state court proceeding the attorney may raise questions based upon his rights under the federal Constitution for eventual review by the United States Supreme Court under its certiorari jurisdiction."

The complaint alleges in paragraph 14:

"The Board has no authority to supervise or discipline the conduct of attorneys in their practice before the courts of the United States." While it is possible, but rather unlikely, an attorney could practice before the federal courts after being disciplined, suspended or disbarred by the State Supreme Court. However, this does not mean an attorney's actions in obtaining, preparing or presenting cases in the federal court are exempt from the State Canons of Ethics, and such actions are not shielded from the

scrutiny, concern and control of the State Supreme Court, which has the responsibility for maintaining the high standards of the legal profession and the integrity of the Bar.

The relationship between the Court and attorneys admitted to practice before it is summarized by Justice Frankfurter in Theard v. United States, 354 U.S. 278 (1957):

"The two judicial systems of courts, the state judiciatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals.

"Membership in the bar is a privilege burdened with conditions" (Matter of Rouss 221 N.Y. 81, 84, 116 N.E. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

Koe was originally admitted to the practice of law by the Supreme Court of South Carolina, and as a practicing attorney she must maintain the high standards of the profession she has chosen. This United States District Court will not now interfere with the investigation by the Board, an arm of that Supreme Court, as it determines whether Koe has conducted her professional affairs in keeping with the Canons of Ethics.

Since the complaint fails to state facts entitling plaintiffs to federal intervention, the same must be and is hereby dismissed.

AND IT IS SO ORDERED.

s/ Robert F. Chapman
ROBERT F. CHAPMAN
UNITED STATES DISTRICT
JUDGE.

December 23rd, 1974

Florence, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed January
24, 1976]

American Civil Liberties
Union and Jane Koe,

Plaintiffs,

vs.

Civil Action
No. 74-1703

O. Harry Bozardt, Jr., H. Hayne
Crum, Joseph O. Rogers, Jr.,
Marion H. Kinon, Edward M.
Royall, II, George F. Coleman,
Robert A. Hammett, Thomas J.
Thompson, Coming B. Gibbs, Jr.,
Lowell W. Ross, Frank E. Harrison,
J. Malcolm McLendon, C. Thomas
Wyche, William L. Bethea, John
B. McCutcheon, Melvin B. McKeown,
Jr., individually and as members
of the Board of Commissioners
on Grievances and Discipline,
and their successors; and the
Attorney General of South Carolina,
Defendants.

O R D E R

This matter is before the Court upon motion of the plaintiffs under Rule 59(e), Federal Rules of Civil Procedure, to alter or amend the Order of December 24, 1974, dismissing this case. The present motion is supported by an affidavit and a memorandum of authorities.

The plaintiffs contend that the affidavit of M.W. supports their claim of bad faith of the defendants and retaliation against the plaintiff Jane Koe in bringing the complaint against her before the Commissioners on Grievances and Discipline. The Court has reviewed the affidavit and finds nothing contained therein which offers any support to plaintiffs' claim of bad faith or retaliation on the part of the defendants. It appears that the present motion, which does not set out the specifics of the alteration or amendment desired is in effect a motion to reverse the December 24, 1974 Order, but regardless of its intent, it is not supported by any new evidence or legal authorities which would cause any amendment or change to the prior Order of the Court.

At a hearing before the Court on January 23, 1975, the plaintiffs also requested the Court to retain jurisdiction of the matter

until after the proceedings before the Board of Commissioners on Grievances and Discipline had been completed. However, the Court finds no useful purpose would be accomplished by retaining jurisdiction. If the plaintiffs wish to test their legal position at the court of last resort, this can be accomplished much more quickly by appeal from the South Carolina Supreme Court to the United States Supreme Court than by going through this court, the Court of Appeals and then the Supreme Court.

IT IS, THEREFORE, ORDERED that the motion to amend or alter the December 24, 1974 Order of this court be and the same is hereby denied and the motion for this court to retain jurisdiction is also denied.

AND IT IS SO ORDERED.

s/ Robert F. Chapman
ROBERT F. CHAPMAN
 UNITED STATES DISTRICT
 JUDGE

January 23rd, 1975

Columbia, South Carolina

CONSTITUTIONAL AND OTHER
PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, Amendment
Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Supreme Court of South Carolina, Rule
on Disciplinary Procedure, Section 4:

4. Misconduct Defined.

Misconduct, as the term is used herein,
means any one or more of the following:

(a) violation of any provision of the
oath of office taken upon admission to the
practice of law in this State;

(b) violation of any of the Canons of
Professional Ethics as adopted by this
Court from time to time;

(c) commission of a crime involving
moral turpitude;

(d) conduct tending to pollute or ob-
struct the administration of justice or to
bring the courts or the legal profession
into disrepute.

(e) emotional or mental stability so un-
certain, as in the judgment of ordinary men,
would render a person incapable of exercising
such judgment and discretion as necessary
for the protection of the rights of others
and/or their property or interest in property.

American Bar Association, Code of Profes-
sional Responsibility, adopted by Supreme
Court of South Carolina, Disciplinary Rule
2-103(D):

DR 2-103 Recommendation of Professional
Employment.

(D) A lawyer shall not knowingly assist a
person or organization that recommends, fur-
nishes, or pays for legal services to promote
the use of his services or those of his
partners or associates. However, he may co-
operate in a dignified manner with the legal
service activities of any of the following,

provided that his independent professional
judgment is exercised in behalf of his
client without interference or control by
any organization or other person:

(1) A legal aid office or public defender
office:

(a) Operated or sponsored by a duly ac-
credited law school.

(b) Operated or sponsored by a bona
fide non-profit community organization.

(c) Operated or sponsored by a govern-
mental agency.

(d) Operated, sponsored, or approved by
a bar association representative of the
general bar of the geographical area in
which the association exists.

(2) A military legal assistance office.

(3) A lawyer referral service operated,
sponsored, or approved by a bar association
representative of the general bar of the
geographical area in which the association
exists.

(4) A bar association representative of
the general bar of the geographical area in
which the association exists.

(5) Any other non-profit organization that
recommends, furnishes, or pays for legal
services to its members or beneficiaries,
but only in those instances and to the ex-
tent that controlling constitutional inter-
pretation at the time of the rendition of
the services requires the allowance of such
legal service activities, and only if the
following conditions, unless prohibited by
such interpretation, are met:

(a) The primary purposes of such organi-
zation do not include the rendition of legal
services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

Supreme Court of the United States

THOMAS RODAK, JR., CLERK

OCTOBER TERM, 1976

No. 76-290

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
PETITIONERS,

versus

O. HARRY BOZARDT, JR., *et al.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional and Other Provisions Involved	2
Questions Involved	2
Statement of the Case	2
Argument:	
I. The Courts Below Did Not Misapply Decisions Of This Court In Dismissing The Complaint For Failure To State Facts Sufficient To En- title The Parties To Federal Equitable Inter- vention	6
II. There Is No Conflict of Decisions	15
Conclusion	16
Appendix	17

TABLE OF CITATION

Cases:	PAGE
Allee v. Medrano, 416 U. S. 802, 94 S. Ct. 2191, 40 L. Ed. 566 (1974)	10, 11
Anonymous v. Association of the Bar of the City of New York, 515 F. 2d 427 (2nd Cir. 1975), <i>cert. denied</i> , 423 U. S. 863, 96 S. Ct. 71, 46 L. Ed. 2d 92 (1975)	passim
Burns v. Clayton, 236 S. C. 316, 117 S. E 2d 300 (1960)	8, 9, 11
Doe v Pierce, Civil Action No. 74-475 (D. S. C.) ...	4, 5, 13
Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)	13
Doran v. Salem Inn, Inc., 422 U. S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975)	12
Erdmann v. Stevens, 458 F. 2d 1205 (2nd Cir. 1972), <i>cert. denied</i> , 409 U. S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 147 (1972)	passim
Huffman v. Pursue, Ltd., 592 U. S. 420, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975)	8
<i>In re Ruffalo</i> , 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968)	8
Lynch v. Snapp, 472 F. 2d 769 (4th Cir. 1973)	8
Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923)	10
Mildner v. Gulatto, 405 F. Supp. 182 (E. D. N. Y. 1975) <i>aff'd</i> , 425 U. S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976)	6, 7, 15, 16
Niles v. Lowe, 407 F. Supp. 132 (D. Hawaii 1976)	13, 14, 16
O'Shea v. Littleton, 414 U. S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)	10
Polk v. State Bar of Texas, 480 F. 2d 998 (5th Cir. 1973)	15

TABLE OF CITATION—(Continued)

Cases:	PAGE
Steffel v. Thompson, 415 U. S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)	12
Taylor v. State Bar of Texas, 424 F. 2d 478 (6th Cir. 1970)	16
Younger v. Harris, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)	passim
Constitutional Provision:	
Amendment 1	10, 11, 14
Amendment 14	10, 11
Statutes:	
Rule 53, Federal Rules of Civil Procedure	7
South Carolina Supreme Court's Rule on Disciplinary Procedure:	
Rule 3	7
Rule 18	5
Rule 34	8, 9, 10
New York Judiciary Laws § 90(2)	7
Other Authorities:	
ABA, Code of Professional Responsibility:	
DR 1-102 (A) (5)	5, 14
DR 1-103 (A)	5

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-290

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
PETITIONERS,

versus

O. HARRY BOZARDT, JR., *et al.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 539 F. 2d 340 (1976). The opinions delivered in the courts below are fully set out in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

In addition to the provisions set forth in the Petition, the entire Rule on Disciplinary Procedure of the South Carolina Supreme Court is set out in the Appendix at 1a.

QUESTIONS INVOLVED

1. Whether the doctrines of equity, comity, and federalism expounded in *Younger v. Harris* apply to a state court disciplinary proceeding?

2. Whether the American Civil Liberties Union can seek federal equitable relief on behalf of its members, including Petitioner Jane Koe, if such federal intervention would directly interfere with a pending state proceeding against Petitioner Koe?

3. Whether the District Court correctly dismissed the petitioners' Complaint for failure to state facts sufficient to entitle them to federal intervention?

STATEMENT OF THE CASE

Petitioners, the American Civil Liberties Union and Jane Koe, filed this action in the United States District Court for the District of South Carolina on October 31, 1974, seeking injunctive relief, a declaratory judgment, and costs and attorney fees against the South Carolina Supreme Court's Board of Commissioners on Grievances and Discipline and the South Carolina Attorney General. The District Court dismissed the Complaint on the ground that petitioners had failed to state facts sufficient to entitle them to federal intervention under the principles set forth in *Younger v. Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), as applied in *Erdmann v. Stevens*, 458 F. 2d 1205 (2nd Cir., 1972), *cert. denied*, 409 U. S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 148 (1972). [Appendix to Petition 27a.] A Motion to Alter or Amend was denied by the

District Court on January 23, 1975. [Appendix to Petition at 48a.] The United States Court of Appeals for the Fourth Circuit affirmed the holding of the District Court. [Appendix to Petition at 1a.] A Petition for Rehearing *en banc* was likewise denied [Appendix to Petition at 18a].

Petitioner Koe is an attorney licensed to practice law in the State of South Carolina and, at the time of these events, was engaged in private practice with the Carolina Community Law Firm (the firm's name was later changed). Koe during this period also served as an officer and member of the Board of Directors of the South Carolina Chapter of the American Civil Liberties Union. In July, 1973, Petitioner Koe met with several individuals including a Mrs. M. W. concerning the sterilizations performed on women by private physicians in Aiken County. During the meeting, Petitioner Koe advised Mrs. M. W. of her legal rights and remedies in regard to her sterilization and informed her of her right to bring an action for money damages against the doctor. In talking with Mrs. M. W., Petitioner represented herself to be an attorney and informed the group that the ACLU, also a petitioner herein, was an organization that could bring this legal action on behalf of these women. Mrs. M. W. advised Petitioner Koe that she would contact her, if she decided to bring such an action. On August 30, 1973, without having been contacted by Mrs. M. W. in any way during the interim, Petitioner Koe wrote to Mrs. M. W. on the stationery of her private law firm, Carolina Community Law Firm, signing the letter as Attorney-at-Law. In her letter, Petitioner Koe stated:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union

would like to file a law suit on your behalf for money against the doctor who performed the operation.

* * *

About the lawsuit, if you are interested let me know, and I'll let you know when we will come down to talk to you about it.

Thereafter, Mrs. M. W. informed Petitioner Koe that she had no intention of suing her doctor.

On October 19, 1974, John W. Williams, Secretary of The Board of Commissioners on Grievances and Discipline, filed a Complaint against Petitioner alleging that Petitioner Koe's letter to Mrs. M. W. constituted solicitation in violation of the Code of Professional Responsibility. [Appendix to Petition at 29a.] On October 31, 1974, the petitioners filed their action in District Court seeking to enjoin the Board from hearing or otherwise processing the Complaint against Petitioner Koe. The petitioners' Complaint made the bare allegation that the disciplinary action was initiated against Petitioner Koe in bad faith¹ for purposes of harassment because of a lawsuit brought by the ACLU². They further allege that Rule 4(d) of the South Carolina Supreme Court's Rules on Disciplinary Procedure was vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution. The

¹ The petitioners' complaint in this action did not allege any acts of "bad faith" against the Board of Commissioners on Grievances and Discipline, but only against the South Carolina Attorney General's Office, a separate and distinct entity. (See, Petitioners' Brief, page 7.) The complainant in the grievance proceeding was John W. Williams, a private attorney who serves as the Secretary of The Board of Commissioners on Grievances and Discipline, but not as a Board member.

² On April 15, 1974, a civil action was filed by two black women (not Mrs. M. W.), which was entitled *Doe v. Pierce*, Civil Action No. 74-475 (D. S. C.). The plaintiffs were represented by attorneys associated with the ACLU. The South Carolina Attorney General's Office represented the State Commissioner and the Aiken County Director of the Department of Social Services. The trial resulted in verdicts in favor of both state defendants. A judgment for nominal damages was awarded on behalf of one of the plaintiffs against the private physician who was represented by private counsel. No member of the Board of Commissioners or its Secretary, Mr. Williams, represented any party or was in any other way connected with *Doe v. Pierce*.

petitioners further alleged in their Complaint before the District Court that the Board was collaterally estopped because of the proceedings in *Doe v. Pierce*, or alternatively that *Doe v. Pierce* was *res judicata* as to the issue of solicitation, and that the Board had no authority to supervise or discipline the conduct of attorneys, when such conduct occurs in practicing before federal courts.³

The Respondents make no statement in response to Petitioners' statement concerning any disciplinary proceeding or panel report in regard to Petitioner Koe.⁴

³ On May 10, 1974, a hearing was held before the Honorable Sol R. Blatt, United States District Court Judge for the District of South Carolina and the presiding judge in *Doe v. Pierce*, concerning the issue of solicitation as it affected the appropriateness of a class action. Permission was granted to take the depositions of plaintiffs in order to determine if similar letters had been sent out to other women. During the course of this hearing, Judge Blatt made the following statements in regard to proceeding for a possible ethical violation:

The COURT: If I were to decide that it had no bearing on the litigation itself, you may or may not want to bring the letter to the attention of the appropriate authority that is set up to handle such matters.

* * *

I think he [plaintiffs' attorney] is correct, that solicitation has nothing to do with the right of plaintiffs to bring the suit. Then solicitation would be an issue before the appropriate authorities and not before the court.

* * *

Active solicitation might subject the person soliciting to a criminal procedure or it might subject them to disciplinary action by the appropriate legal committee, but it has nothing to do with the case itself.

Thereafter, depositions as ordered by Judge Blatt were scheduled during the first week of August, 1974. On August 19, 1974, Petitioner Koe's letter was forwarded to the Board for whatever action the Board deemed appropriate. In this regard, Disciplinary Rule 1-103(A) of the Code of Professional Responsibility provides:

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [which defines "misconduct"] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

The attorney in the Office of the Attorney General of South Carolina that forwarded Petitioner Koe's letter to the Board, was not the Attorney responsible for prosecuting this case before the Board (nor was the prosecuting attorney an attorney in any way involved in *Doe v. Pierce*).

⁴ Rule 18 of the South Carolina Supreme Court's Rule on Disciplinary Procedure provides that all proceedings and documents relating to complaints and hearings thereon and to proceedings in connection therewith shall be private, unless the attorney involved shall request in writing that they be public and the court shall so order. A violation of this provision is deemed as contempt of the South Carolina Supreme

ARGUMENT

I. The courts below did not misapply decisions of this Court in dismissing the Complaint for failure to state facts sufficient to entitle the parties to federal equitable intervention.

The petitioners contend that *certiorari* should be granted because the courts below "decided an important question of federal practice by an unprecedented and unwarranted extension of the application of the doctrine of comity." The petitioners further argue that the courts below misapplied *Younger v. Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) and its progeny to this case because: (1) the disciplinary proceeding was an administrative proceeding; (2) there was no state proceeding pending against the Petitioner ACLU; and (3) the petitioners' case falls within one of the exceptions recognized in *Younger v. Harris*, *supra*.

A. The Disciplinary Proceeding was an Administrative Action.

Contrary to petitioners' assertions, this Court has on several occasions suggested that disciplinary proceedings are entitled to the considerations of equity, comity and federalism set forth in *Younger v. Harris*, *supra*. See, *Mildner v. Gulotta*, 405 F. Supp. 182 (E. D. N. Y. 1975), *aff'd*, 425 U. S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976); *Anonymous v. Association of the Bar of the City of N. Y.*, 515 F. 2d 427 (2nd Cir. 1975), *cert. denied*, 423 U. S. 863, 96 S. Ct. 71, 46 L. Ed. 2d 92 (1975); *Erdmann*

Court. On October 28, 1976, respondents were informed by the Clerk of the South Carolina Supreme Court that Section 18 of the Rule had not been relaxed in any way. Respondents are shocked that attorneys for petitioners would introduce parts of a panel report, which is not part of the record in this appeal, especially after petitioners' attorneys were severely admonished by the court for attempting to introduce this document at oral argument before the United States Court of Appeals over our objection and in violation of the South Carolina Supreme Court's Rule.

v. Stevens, 458 F. 2d 1205 (2nd Cir. 1972), *cert. denied*, 409 U. S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 147 (1972). In *Erdmann v. Stevens*, *supra*, the court found that the Appellate Division, First Department, was acting in a judicial capacity as a state court in the disciplinary proceedings, and that the proceedings were judicial, not administrative, in nature. *Id.* at 1209. The New York disciplinary procedure⁵ appears to be very similar, if not identical, to the procedure used by the South Carolina Supreme Court. As in the New York procedure, the South Carolina Supreme Court has exclusive power to resolve issues as to alleged misconduct of attorneys practicing before it.⁶ As in New York⁷, the South Carolina Supreme Court invokes the assistance of a board or committee to conduct hearings with respect to complaints regarding members of the bar,⁸ but the disciplinary power continues to rest ultimately with the court and the findings of the

⁵ New York Judiciary Law § 90(2).

⁶ Rule 3 of the South Carolina Supreme Court's Rule on Disciplinary Procedure provides:

All proceedings for the investigation of complaints and grievances involving alleged misconduct of any member of the bar of this state, all proceedings for the discipline of such members of the bar, and all proceedings for reinstatement to the practice of law in this state shall be brought, conducted and disposed of in accordance with the provisions of this Rule.

⁷ See, *Mildner v. Gulotta*, *supra*, at 190; *Erdmann v. Stevens*, *supra*, at 1209.

⁸ Such a procedure is used by federal courts who employ a special master to hear and report. Rule 53, Federal Rules of Civil Procedure. In *Anonymous*, *supra*, Appellants attempted to distinguish *Erdmann*, *supra*, in that injunctive relief was being sought against a grievance committee, not the court. The court noted that the committee was performing its duties as a quasi-judicial body and an arm of the court, much as the special master in federal court, and thus that a proceeding before such a committee constituted a "judicial proceeding."

Board are in no way binding upon the Court.⁹ Petitioners contend that a disciplinary proceeding is neither a criminal prosecution nor a state civil proceeding which is in aid of or closely related to criminal statutes. *Huffman v. Pursue, Ltd.*, 592 U. S. 420, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975). While this Court has held that a disciplinary proceeding is a judicial proceeding of a quasi-criminal nature, *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *Mildner v. Gulotta*, *supra*, it is submitted that the notions of comity and federalism as expressed by the Court in *Younger* should not turn on labels such as "civil" or "criminal" but rather upon an analysis of the competing interests involved in each case. *Lynch v. Snepp*, 442 F. 2d 769 (4th Cir. 1973). As the court in *Huffman v. Pursue, Ltd.*, *supra*, observed:

[I]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be

⁹ The Board of Commissioners on Grievances and Discipline was created by the South Carolina Supreme Court to "receive, entertain, inquire into, take proofs, make findings, and submit recommendations to the court concerning complaints of misconduct." In *Burns v. Clayton*, 237 S. C. 316, 331, 117 S. E. 2d 300, 301 (1960), the South Carolina Supreme Court expressed the duties and responsibilities of the Board as follows:

... The Board of Commissioners on Grievances and Discipline are offices of this Court, commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members of the Bar of this State and of reporting to this Court the proceedings of their findings and recommendations. . . The Board's report is advisory only, this Court being in nowise bound to accept its recommendations; and upon this Court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.

Rule 34 of the Court's Rule on Disciplinary Procedure provides: Nothing in these Rules shall be construed to deprive the Supreme Court of the authority to require the certification to it of the record in any case, for such action as it deems proper.

interpreted "as reflecting negatively upon the state courts' ability to enforce constitutional principles." (Citations omitted.)

The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding. *Id.* at 604, 95 S. Ct. at 1208, 43 L. Ed. (2d) at 492.

Therefore, *Huffman* establishes that the principles of comity and federalism "are not to be discarded simply because the state action sought to be enjoined is yecept civil." *Anonymous v. Association of the Bar of the City of N. Y.*, *supra*, at 433.

In *Erdmann v. Stevens*, *supra*, the court appropriately observed the interests of the courts in disciplining its attorneys:

The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness. *Id.* at 1210.

Petitioners' contention that the disciplinary procedure in this case is administrative in nature is based on the clearly erroneous statement that the South Carolina Supreme Court does not have jurisdiction to review this case. Such a contention is directly refuted by the Rule of Disciplinary Procedure¹⁰ and South Carolina court decisions.¹¹ The

¹⁰ See, Rule 34.

¹¹ See, *Burns v. Clayton*, 237 S. C. 316, 117 S. E. 2d 300 (1960).

petitioners must admit error in this regard since the South Carolina Supreme Court, pursuant to Rule 34, granted Petitioner Koe's petition for writ of *certiorari* in the grievance case.¹²

B. No state proceeding was pending against Petitioner ACLU.

Petitioner ACLU contends that the courts below erred in denying the ACLU the opportunity to litigate its claim for declaratory relief. In the Complaint before the District Court, petitioners had requested the District Court to declare "that the [grievance] complaint filed against plaintiff Koe and proceedings before the Board of Commissioners on Grievances and Discipline violate rights secured to plaintiffs by the First and Fourteenth Amendments of the United States Constitution."

Standing to bring suit must be personal to and satisfied by those who seek to invoke the power of the federal courts. The plaintiff must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged statute or official conduct. *Massachusetts v. Mellon*, 262 U. S. 447, 43 S. Ct., 597, 67 L. Ed. 1078 (1923); *O'Shea v. Littleton*, 414 U. S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974).¹³ A grievance action

¹² By letter dated October 28, 1976, attorneys for Petitioners advised this Court that the South Carolina Supreme Court on September 16, 1976, granted Petitioner Koe's request to review the disciplinary proceeding in *Williams v. Anonymous*.

¹³ In *Allee v. Medrano*, 416 U. S. 802, 94 S. Ct. 2191, 40 L. Ed. 2d 566 (1974) Chief Justice Burger observed in his separate opinion that:

Prosecutions instituted against persons who are not named plaintiffs cannot form the basis for standing of those who bring the action. In particular, a named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the backdoor of a class action. *Id.* at 828-9, 94 S. Ct. at 2207, 40 L. Ed. 2d at 588.

Petitioner ACLU has not claimed that it has ever been threatened with prosecution, if indeed such a prosecution was possible, or that a prosecution was even likely. Petitioner ACLU merely claimed that the prosecu-

is a proceeding against an individual attorney's license to practice law. *Burns v. Clayton*, 237 S. C. 316, 117 S. E. 2d 300 (1960). Therefore, it is apodictic that the ACLU has not sustained or is not in danger of suffering any direct injury as a result of the grievance Complaint against Petitioner Koe. Any standing by the Petitioner ACLU to seek a declaratory judgment for the filing of a grievance Complaint against Koe, would be a derivative right based on the injury suffered by its member, Petitioner Koe. The Petitioner ACLU asserts the derivative right to bring a declaratory judgment action on behalf of its member Koe.¹⁴ The Fourth Circuit correctly noted, however, that:

If the ACLU were found to have standing to assert rights of its associated attorneys derivatively, and this standing was asserted only on the basis of the injury to Koe, it is clear that the organization's action for equitable relief would be subject to the same restrictions as Koe's action, since its rights would be derived entirely from Koe's rights . . . To permit the ACLU to assert rights to those associates not bound by the *Younger* restrictions in order to obtain federal equitable relief which would necessarily benefit all its associates would directly interfere with the pending state proceedings, and have the effect of circumventing the *Younger* restrictions which bar Koe from seeking direct federal relief. We conclude that *Allee* and *Steffel*

tion of Koe had a "chilling effect" on their First and Fourteenth Amendment rights. This Court has held that such an allegation is not sufficient to bring the equitable jurisdiction of federal courts into play to enjoin a pending state prosecution. *Younger v. Harris*, 401 U. S. 37, 51, 91 S. Ct. 746, 754, 27 L. Ed. 2d 669, 679. Therefore, there is no case or controversy with the petitioner ACLU. The United States Court of Appeals for the Fourth Circuit correctly held that the ACLU had no independent standing to challenge state disciplinary proceedings since no disciplinary proceedings can be brought against the ACLU itself. [Appendix to Petitioners' Brief at 7a.]

¹⁴ The court below noted that *Allee v. Medrano*, 416 U. S. 802, 94 S. Ct. 2191, 40 L. Ed. 2d 566 (1974), recognized that a labor union had standing to raise any claims that one of its members would have, if the union was in a position to suffer real injury derivatively when there was infringement upon the Constitutional rights of its member. However, it was unnecessary to decide if the ACLU has such standing in this case. [Appendix to Petition at 7a.]

were not intended to be interpreted so as to permit a litigant to avoid *Younger* restrictions merely by joining his claim with claims of others asserting a joint interest. [Appendix to Petitioner's Brief at 9a.]¹⁵

To allow Petitioner ACLU to seek declaratory relief on issues which are identical to those pending before a state proceeding would result in an unnecessary duplication of legal proceedings. In *Erdmann v. Stevens*, 458 F. Supp. 1205 (2nd Cir. 1972) the court opined:

Undoubtedly because of [the] general recognition of the advisability of permitting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages. *Id.* at 1211.

Furthermore, federal intervention would be disruptive of the state grievance proceeding and reflect negatively on the state court's ability to enforce constitutional principles.

C. The petitioners' Complaint did not state facts sufficient to fall within the exceptions to *Younger v. Harris*.

Contrary to petitioners' assertions, the courts below found that petitioners' case did not fall within the exceptions to the general rule against federal intervention as set forth in *Younger v. Harris*, *supra*. The District Court complaint made bare assertions that the disciplinary action

¹⁵ In *Steffel v. Thompson*, 415 U. S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1976) declaratory relief was sought by an individual who had been threatened with prosecution for distributing anti-war literature with another individual (who had been prosecuted). Thus, the plaintiff in *Steffel* was asserting his personal right rather than a derivative right. This Court noted in *Doran v. Salem Inn, Inc.*, 422 U. S. 922, 95 S. Ct. 2561, 45 L. Ed. 648 (1975), that there would plainly be circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them.

was in bad faith and for purposes of harassment. However, the only factual allegation in support of such bare assertions was that the South Carolina Attorney General had withheld a "ruling" by the District Court in *Doe v. Pierce*, Civil Action 74-475 (D. S. C.) from the Board, which "ruling" was *res judicata* as to the issue of solicitation, or collaterally estopped the proceedings before the Board. The District Court specifically rejected the argument that the "ruling" had any effect on the grievance proceeding. [Appendix to Petition at 43a-44a.] No allegation could be made, or was made, that the same disciplinary rules were not applied equally to all members of the South Carolina Bar. Thus, the petitioners' Complaint did not establish the type of selective bad faith prosecution which justified an exception to *Younger*.¹⁶ See, *Niles v. Lowe*, 407 F. Supp. 132 (D. Hawaii 1976). Furthermore, the courts below correctly noted that there was also no showing of irreparable injury, both great and immediate. *Younger v. Harris*, *supra*, at 46, 91 S. Ct. at 751, 27 L. Ed. 2d at 676-7. Any threats which these proceedings pose to petitioners' federal rights may be eliminated by presenting their contentions to the South Carolina Supreme Court.¹⁷ [Appen-

¹⁶ The court in *Anonymous v. Association of the Bar of the City of N. Y.*, 515 F. 2d 427 (2nd Cir. 1975), noted that the plaintiffs in *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965), alleged that police had made illegal searches, that prosecutors threatened prosecution under unconstitutional statutes, and that the illegally obtained documents were being shown at public hearings. As in *Anonymous*, the plaintiffs in this case have made no showing of the type of official lawlessness which warranted federal intervention in *Dombrowski*.

¹⁷ In *Younger v. Harris*, *supra*, this Court held that:

Certain types of injury, in particular the cost, anxiety and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. *Id.* at 46, 91 S. Ct. at 751, 27 L. Ed. 2d at 676-7.

Thus, the Court in *Erdmann v. Stevens*, *supra*, at 1208, correctly observed that the plaintiff must show grave and irreparable injury without reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised.

dix to Petition at 41a.] See, *Niles v. Lowe*, supra; *Erdmann v. Stevens*, 458 F. 2d 1205 (2nd Cir. 1972), cert. denied, 490 U. S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 147 (1972). Having found no sufficient allegation of bad faith, harrassment, or irreparable injury, both grave and immediate, the courts below were correct in dismissing the petitioners' Complaint under the doctrine of *Younger v. Harris*, supra.

Moreover, the petitioners' allegation in their Complaint that Rule 4(d) of the South Carolina Supreme Court's Rule on Disciplinary Procedure¹⁸ is vague and overbroad does not meet the requirements for federal intervention under *Younger v. Harris*, supra. This allegation is no more than an assertion that the statute is vague and overbroad "on its face". In *Younger*, this Court opined:

We do not think that opinion [*Dombrowski v. Pfister*, supra,] stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridges First Amendment Rights. *Id.* at 53, 91 S. Ct. at 755, 27 L. Ed. 2d at 681.

The petitioners did not in fact allege, as they argue in their Brief, that the Rule is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effect might be made to apply it.¹⁹

¹⁸ Actually, as noted by the District Court [Appendix to Petition at 29a, 33a] the grievance Complaint charged misconduct by a violation of the Canons of Ethics [Code of Professional Responsibility] or by conduct tending to pollute or obstruct the administration of justice or to bring the courts or legal profession into disrepute. See also, ABA's Code of law that a violation of the Code of Professional Responsibility would also be conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute. See also, ABA's Code of Professional Responsibility, Disciplinary Rule 1-102(A)(5).

¹⁹ *Younger v. Harris*, supra, at 53-4, 94 S. Ct. at 755, 27 L. Ed. 2d at 681.

Therefore, the courts below were again correct in finding that petitioners' case did not fall within the exceptions of *Younger v. Harris*.²⁰

II. There is no conflict of decisions.

The petitioners contend that there is a conflict of decisions among the circuit courts of appeal concerning the application of *Younger v. Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) to grievance proceedings, citing *Polk v. State Bar of Texas*, 480 F. 2d 998 (5th Cir. 1973) and *Erdmann v. Stevens*, 458 F. 2d 1205 (2nd Cir. 1972), cert. denied, 409 U. S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 147 (1972); *Anonymous v. Association of the Bar of the City of N. Y.*, 515 F. 2d 427 (2nd Cir. 1975), cert. denied, 423 U. S. 863, 96 S. Ct. 71, 46 L. Ed. 2d 92 (1975); and the courts below.

Actually the *Polk* case is readily distinguishable from the Second Circuit decisions and the decisions of the courts below. In Texas, the grievance system is bifurcated—the grievance committee of the State Bar can hear the case itself (in which case the committee does not have the power to disbar or suspend) or a formal complaint can be issued in the state district courts. In *Polk*, the court was only considering the application of *Younger* to a proceeding before the grievance committee of the State Bar and not a pro-

²⁰ The petitioners by letter, dated October 28, 1976, to the Clerk of the United States Supreme Court requested that their Petition in this case be deferred until the South Carolina Supreme Court had ruled in this grievance case, *Williams v. Anonymous*. Thus, they have tacitly recognized that their rights can best be adjudicated after the state court has construed the disciplinary rules or other state laws involved. This realization is indeed the very essence of the decisions in *Erdmann*, *Anonymous*, and *Mildner v. Gulotta*, supra, which support the traditional method of adjudication of federal rights in grievance proceedings by way of the state appellate court route to the United States Supreme Court.

ceeding before the courts.²¹ Under the South Carolina Supreme Court's Rule on Disciplinary Procedure, the Board of Commissioners is empowered to hear all cases and recommend not only a reprimand but suspension or disbarment.²²

In any event, this Court has adopted the decisions of the Second Circuit in *Erdmann* and *Anonymous* holding that grievance proceedings are judicial proceedings to which *Younger* applies. *Mildner v. Gulotta*, 405 F. Supp. 182 (E. D. N. Y. 1975), *aff'd*, 425 U. S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976). Therefore, to the extent that *Polk* conflicts with this Court's decision in *Mildner v. Gulotta*, *supra*, it would be overruled and any conflict removed.

CONCLUSION

For the foregoing reasons, the respondents submit that the petitioners' Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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²¹ In *Niles v. Lowe*, 407 F. Supp. 132 (D. Hawaii 1976), the Court observed that conventional administrative agencies, even when they adopt quasi-judicial procedures, derive their delegated authority not from the courts but from the legislature. In South Carolina, as in New York, the Board is an agent of the South Carolina Supreme Court and its inquiries are a part of the court's judicial function.

²² *Taylor v. Kentucky State Bar Association*, 424 F. 2d 478 (6th Cir. 1970) does not support petitioners' contention since it was a pre-*Younger* case.

APPENDIX

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RULE ON DISCIPLINARY PROCEDURE

(As amended by the Supreme Court on June 12, 1975.)

1. Creation of Board of Commissioners on Grievances and Discipline.

There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. The said Board of Commissioners is empowered and charged to receive, entertain, inquire into, take proofs, make findings, and submit recommendations to this Court, as hereinafter provided:

(a) concerning complaints of misconduct, as hereinafter defined, on the part of any member of the bar of this state;

(b) concerning practices of any member of the bar of this state which tend to pollute or obstruct the administration of justice or to bring the courts or the legal profession into disrepute; and

(c) relating to petitions for reinstatement of the practice of law in this state.

2. Constitution, Appointment and Tenure of the Board of Commissioners on Grievances and Discipline.

The said Board of Commissioners shall be appointed by this court and shall consist of one (1) member of the bar of this state from each of the Judicial Circuits of the state. The term of office of each member of the said Board shall be three years, or until a successor has been appointed, and shall begin on the first day of October next following his or her appointment. Vacancy for any cause shall be promptly filled by appointment by this Court for the unexpired term. At the time of its initial appointments to membership, and each year thereafter, this Court shall designate one member as Chairman of the said Board of Commissioners and shall also designate a Secretary, who may, but need not, be a member of the said Board. Provided, however, should any member be engaged in a Panel or

Panels at the expiration of his term, he shall continue to serve until completion of his work on such Panel or Panels as a member thereof despite the fact that his successor for all other purposes of the Board of Commissioners on Grievances and Discipline has been appointed and qualified.

3. Rule Exclusive.

All proceedings for the investigation of complaints and grievances involving alleged misconduct of any member of the bar of this state, all proceedings for the discipline of such members of the bar, and all proceedings for reinstatement to the practice of law in this state shall be brought, conducted and disposed of in accordance with the provisions of this rule.

4. Misconduct Defined.

Misconduct, as the term is used herein, means any one or more of the following:

- (a) violation of any provision of the oath of office taken upon admission to the practice of law in this state;
- (b) violation of any of the Canons of Professional Ethics as adopted by this court from time to time;
- (c) commission of a crime involving moral turpitude;
- (d) conduct tending to pollute or obstruct the administration of justice or to bring the courts or the legal profession into disrepute.
- (e) emotional or mental stability so uncertain, as in the judgment of ordinary men, would render a person incapable of exercising such judgment and discretion as necessary for the protection of the rights of others and/or their property or interest in property.

5. Manner of Discipline.

Every member of the bar found guilty of misconduct shall be disciplined, in accordance with the seriousness of such misconduct, by:

- (a) permanent disbarment; or
- (b) suspension for an indefinite period from the office of attorney at law, subject to reinstatement only as hereinafter provided; or

- (c) public reprimand; or
- (d) private reprimand.

6. Effect of Discipline.

A person disbarred shall never be readmitted to the practice of law in this state.

A person who, having voluntarily surrendered his license to practice, has been thereafter reinstated in the manner hereinafter provided, or who, having been suspended for an indefinite period from the office of attorney at law, has been thereafter reinstated in the manner hereinafter provided, shall be disbarred upon being found guilty of subsequent misconduct.

A person who, having been publicly reprimanded for misconduct, is thereafter found guilty of subsequent misconduct, shall be suspended for an indefinite period from the office of attorney at law, or permanently disbarred, depending upon the seriousness of such misconduct.

7. Complaint.

A complaint, as the term is used herein, means a formal written complaint alleging misconduct on the part of a member of the Bar of this State, who shall be designated therein as the respondent. The complainant may be (1) any individual, firm or corporation; (2) the grievance committee of a regularly organized local bar association; or (3) a member of the Board of Commissioners as provided in Section 31 of this Rule. Such complaint shall not be accepted for filing unless it is:

- (a) verified under oath of the complainant; or
- (b) signed by one or more members in good standing of the Bar of this State, as counsel for the complainant. Signature by such counsel shall constitute a representation that he or they (1) have investigated the charges of misconduct alleged in the complaint, (2) believe reasonable cause exists to warrant a hearing on said complaint, and (3) have accepted the responsibility of prosecuting the complaint to conclusion. When the grievance committee of a regularly organized local bar association is the complain-

ant, verification of the complaint shall be by the chairman of that committee.

By filing a Complaint with the Commission the Complainant places himself or herself under these Rules and submits himself or herself to the jurisdiction of the Court and the Board of Commissioners. Any Complainant who shall, without just cause or excuse, after Notice of a hearing duly given, fail to appear before the Panel at the time prescribed in said Notice, shall render himself or herself subject to taxation of costs incurred for such hearing and shall be deemed in contempt of this Court and punishable accordingly; and any Complainant found by the Board, or any Panel hearing a Complaint, to have filed a complaint without just cause or excuse or to be otherwise motivated by malice or reason contrary to the spirit of this Rule, shall likewise be in contempt of this Court and punishable accordingly. If such Complainant be a lawyer he shall be subject to Complaint against him for misconduct.

Whenever a Complaint charges a Respondent with misconduct because of practicing law when not capable of exercising the discretion and judgment necessary as provided by Sec. 4 (c), the Secretary shall forward with the copy of the Complaint mailed in accordance with this Rule, a Notice to Respondent that a Guardian ad Litem must be, within twenty days, appointed in his behalf by the Clerk of the Court on Petition by Respondent or someone in behalf of Respondent, and in the event Respondent fails to have a Guardian ad Litem so appointed, the Commission will petition the Clerk of this Court for such appointment.

8. Filing of Complaint; Procedure Thereon.

All complaints shall be filed in quadruplicate with the Secretary of the Board of Commissioners. If the said Board of Commissioners shall find that the complaint, upon its face, does not state facts sufficient to charge misconduct as herein defined, the said complaint shall be dismissed, and the Secretary of the Board shall so notify the complainant. Otherwise the said Secretary shall forthwith cause to be sent to the respondent by registered mail a copy of said complaint, together with a notice, signed by the said Sec-

retary, requiring the respondent, within twenty (20) days after the mailing of such notice, to file with the Board, in quadruplicate, his answer to the complaint, and to serve a copy of said answer upon the complainant or his counsel of record. The answer shall be signed by the respondent or by his counsel, or by both, and may, but need not be, verified.

The Secretary shall also forward to the resident judge of the attorney a copy of said complaint and any answer filed by respondent or his counsel. Thereafter the Secretary shall notify the resident judge of the disposition by the Board. All such communications shall be confidential except as between the resident judge and the presiding judge of the Circuit or any county court judge within the Circuit.

9. Hearing by Panel of Three Commissioners.

After respondent's answer has been filed, or the time has expired within which respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice to complainant and respondent or their counsel, by a panel of three (3) Commissioners appointed by the Chairman of the said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. No member of such panel shall be a resident of the Judicial Circuit from which the complaint originated, or of the Judicial Circuit in which the respondent resides at the time of the filing of the complaint. The Chairman of the Board of Commissioners may, whenever he deems it advisable, request the Attorney General's Office to handle the prosecution of a claim before the hearing panel.

10. Duty of the Panel.

(a) If the panel shall find that the charges in the complaint are not supported by the evidence, or do not merit the taking of disciplinary action, the panel will make a certified report of the proceedings before it, including its findings of fact and recommendations and shall file the same and an itemized statement of the actual and necessary expenses incurred by it in connection with such proceedings with the Secretary of the Board of Commissioners.

(b) If the panel shall find and determine that the respondent is guilty of misconduct and that a private reprimand should be administered, the panel shall make a certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same and an itemized statement of the actual and necessary expenses incurred by it in connection with such proceedings with the Secretary of the Board of Commissioners.

(c) If the panel shall find and determine that the respondent is guilty of misconduct meriting public reprimand, indefinite suspension, or permanent disbarment, it shall make a certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with a transcript of the testimony taken, such exhibits as may have been in evidence before it, and an itemized statement of the actual and necessary expenses incurred by it in connection with such proceedings, with the Secretary of the Board of Commissioners.

11. Review by the Board of Commissioners; Private Reprimand.

Whenever the panel has filed its report, the Board of Commissioners through its Secretary, shall, before acting upon such report, notify the respondent and his counsel, if any, of the time and place at which the Board will consider the report for the purpose of determining its action thereon, such notice to be given not less than thirty days prior to such meeting. The respondent and his counsel shall have the right, and shall be so informed in said notice, to appear before the Board at said meeting and thereupon to submit briefs and be heard in oral argument in opposition to or in support of the recommendations of the panel. Like notice shall be given, and like opportunity to submit briefs and be heard in oral argument in support of or in opposition to the recommendations of the panel shall be afforded, to the complainant and his counsel, if any, and to the Attorney General's Office where that office has participated in the hearing before the panel.

Upon consideration of the report of the panel, and the showing made to the Board, the Board of Commissioners may:

- (a) Refer the matter back to the panel for further hearing; or
- (b) Order a further hearing before the said Board of Commissioners; or
- (c) Proceed upon the certified report of the prior proceedings before the panel.

Upon its final review, the Board of Commissioners may either dismiss the complaint or find that the respondent is guilty of misconduct. If the Board shall determine that a private reprimand should be administered, it shall administer such reprimand. If the complaint is dismissed or if a private reprimand is administered, the Secretary of the Board of Commissioners shall thereupon so notify the respondent, the complainant, all counsel of record, and, when deemed appropriate, and requested in writing by respondent, the local Bar Association, or associations of the county or counties in which respondent resides and maintains an office, and other county or counties from which the complaint arose.

12. Public Reprimand; Suspension or Permanent Disbarment; Duty of Board after Review.

If the Board of Commissioners shall determine that the respondent is guilty of misconduct meriting public reprimand, indefinite suspension, or permanent disbarment, it shall make a final certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with a transcript of the testimony taken, and such exhibits as may have been in evidence before it, and an itemized statement of the actual and necessary expenses incurred by the hearing panel and by the Board in connection with the proceeding, in the office of the Clerk of this Court; and the Secretary of the Board of Commissioners shall forthwith notify the respondent and the complainant, or their counsel, of such action, enclosing with such notice a copy of the Board's findings of fact and rec-

ommendations and a copy of the statement of expenses before mentioned.

13. Court to Order Respondent to Show Cause.

Upon the filing of such final report of the Board of Commissioners, this Court shall issue its order directed to the respondent, requiring him to show cause before this Court at a time to be therein specified, but not less than forty (40) days after issuance of such order, why the report of the Board of Commissioners should not be confirmed and a disciplinary order entered. Copies of such order to show cause, certified by the Clerk of this Court, shall be served under his direction upon the respondent and the complainant, or their counsel, personally or by registered mail.

14. Return of Respondent; Briefs.

At least twenty (20) days before the date for showing cause stated in the order of this Court, the respondent shall make return to said order, setting forth his grounds of objection to the findings and recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report of said Board upon which the said order to show cause was issued, and shall file with the Clerk of this Court the original and ten copies of such return, together with proof of service of the said return upon the Secretary of the Board of Commissioners, upon the complainant or his counsel, and upon the Attorney General of South Carolina, who shall thereafter participate in the proceeding in the public interest, whether or not he shall have been requested by the Chairman of the Board of Commissioners to participate in the earlier phases of the prosecution of the complaint. At the time of filing his return as aforesaid, the respondent shall also file with the Clerk of this Court the original and ten copies of a brief in support thereof, together with proof of service of said brief upon the Secretary of the Board of Commissioners, upon the complainant or his counsel, and upon the Attorney General.

15. Briefs on the Part of Complainant.

Within fifteen (15) days after the filing of respondent's brief, the Attorney General and counsel for the complainant shall, jointly or severally, file with the Clerk of this Court the original and ten copies of such brief or briefs as they may deem necessary in answer thereto, together with proof of service thereof upon respondent or his counsel of record and upon the Secretary of the Board of Commissioners.

16. Form of Return and Briefs.

The return and briefs may be either printed or typewritten, mimeographed or machine duplicated. If printed, they shall conform to the requirements of Rule 5 of this Court; if typewritten, mimeographed or machine duplicated, they shall conform to the requirements of Rule 6.

17. Review by Court.

Upon failure of the respondent to make return to the order to show cause within the time hereinbefore prescribed, or after consideration of the return and such briefs as may have been filed in support of and in opposition to the same, and after hearing argument, if this Court shall desire to hear argument, thereabout, this Court shall enter such order upon the matter as it may find proper, and may include in its order such provision for reimbursement of the actual and necessary expenses incurred by the hearing panel and by the Board of Commissioners as the Court shall deem proper. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of this Court shall mail certified copies thereof: to the respondent, at his last known address; to the complainant; to all counsel of record; to the Board of Commissioners; to the local bar association or associations in the county or counties in which the respondent resides and maintains an office, and in the county or counties from which the complaint originated; to the Clerk of the Court of Common Pleas in each of said counties; and to the Clerk of the District Court of the United States for the district in which said counties are located.

18. Proceedings Private Until Filed in Supreme Court.

Unless and until otherwise ordered by this court, all proceedings and documents relating to complaints and hearings thereon and to proceedings in connection therewith shall be private, unless the respondent shall in writing request that they be public. All complaints shall be captioned "In The Matter of _____" (Name of respondent to be inserted); and except for the official records of the Board and of this court, all references to the respondent throughout any disciplinary proceeding under this Rule shall be by the use of the term "Anonymous", unless and until this court shall otherwise order.

No persons whomsoever in any way connected with a matter before the Board, including witnesses, counsel, counsel's secretaries, Respondent, Board Members, Board employees, reporters or investigators, shall mention the existence of any such proceeding, nor disclose any information pertaining thereto or discuss any testimony or evidence therein except to persons directly involved, and then only to such extent as necessary for a proper disposition of the matter. Provided, however, any proceeding before the Board may be made public upon written request of the Respondent. Violation of this provision shall be deemed contempt of this Court and punishable as such. All persons attending any proceedings or taking part in any matter hereunder shall be advised of this provision upon the commencement thereof. All records and correspondence held by members of the Board at the conclusion of their respective terms of office shall be carefully screened by them. They shall deliver all essential records and correspondence, so held, to the Secretary for filing with the permanent records of the Commission, and destroy all non-essential records having no permanent or continuing effect.

19. Quorum of Board or Hearing Panel.

A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes; and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

20. Service of Notice, Etc.

Wherever in this rule provision is made for the service of any notice, order, report or other paper or copy thereof upon any complainant or respondent or petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such complainant, respondent, or petitioner, either personally or by registered mail.

21. Clerk is Agent for Service of Notices on Non-resident Attorneys.

Service of any notice provided for in this rule upon any non-resident respondent who has been admitted to the practice of law pursuant to the rules of this court, or upon any resident respondent who, having been so admitted, subsequently becomes a non-resident or cannot be found at his usual abode or place of business in this state, may be made by the Secretary of the Board of Commissioners by leaving with the Clerk of this court a true and attested copy of such notice and any accompanying documents and by sending to the respondent, by registered mail, a like true and attested copy, with an endorsement thereon of the service upon the said Clerk, addressed to such respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as may be necessary to afford the respondent reasonable opportunity to appear and defend. The Clerk of this court shall keep a record of the day and hour of the service upon him of such notice and any accompanying documents.

22. Members of Board May Issue Subpoenas and Order Depositions Taken.

Each member of the Board of Commissioners shall have power to issue subpoenas and to administer oaths to witnesses. All such subpoenas shall be issued in the name and under the seal of this court, and shall be signed by a member of the Board of Commissioners. Any member of the

Board of Commissioners may order the testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions; and such depositions may be used to the same extent as permitted in civil actions.

23. Effect of Refusal to Obey Subpoena or to Testify.

If any person subpoenaed as a witness pursuant to this rule shall refuse or neglect to obey said subpoena, to attend, to be sworn or to affirm, or to answer any proper question, he shall be deemed in contempt of this court and punishable accordingly.

24. Rules of Evidence to be Observed.

The rules of evidence shall be observed in the conduct of all hearings.

25. Docket of Complaints.

The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, and the same shall be retained permanently as a part of the records of the Board of Commissioners.

26. When Petition for Reinstatement May be Filed.

No petition for reinstatement to the practice of law shall be filed within two years after the entry of an order indefinitely suspending the petitioner from the practice of law in this State, or within two years after the denial of a petition for reinstatement filed by such petitioner.

27. Contents of Petition for Reinstatement.

Subject to the foregoing restrictions, any person who has been indefinitely suspended from the practice of law and who wishes to be reinstated may file with the Clerk of this court his verified petition, and ten (10) copies thereof, setting forth:

(a) the date when indefinite suspension was ordered, and, if there was a reported opinion concerning the same, the volume and page of the official reports of this court where such opinion appears;

(b) the dates upon which any prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, other than the petitioner and the Board of Commissioners, who were entitled under this Rule to receive from the Clerk of this court certified copies of the disciplinary order of this court resulting in the petitioner's suspension;

(d) the name of the county in which he resides at the time of the filing of the petition, and of each county in which he proposes to maintain an office if reinstated; and

(e) the facts upon which he relies to establish by clear and convincing proof that he has rehabilitated himself.

28. Petition Referred to Committee on Character and Fitness.

Unless the petition for reinstatement be summarily denied for insufficiency in form or substance, the Clerk of this court shall forward five (5) copies thereof to the Secretary of the Committee on Character and Fitness appointed under the rules of this court governing admission of persons to the practice of law in this State; and such petition shall be deemed to be referred, without court order, to said Committee.

29. Action by Committee on Character and Fitness.

The Committee on Character and Fitness shall, with all convenient dispatch, proceed to hold a hearing or hearings, take evidence concerning petitioner's character and his claim of rehabilitation, and report to this court the proceedings had before said Committee, together with the Committee's findings of fact and recommendations. Reasonable notice of all such hearings before the Committee shall be given to the petitioner or his counsel and to the President of the local bar association or associations in the county or counties in which the petitioner resides and in which he proposes to maintain an office in the event of his reinstatement. Such hearings may, in the discretion of the Committee, be public, and shall be public if the petitioner so requests in writing. Any interested person, any member of the bar, and any representative of the South Carolina Bar Association or of any local bar association may appear before the committee in support of, or in opposition to, the petition.

30. Committee's Report to be Filed; Procedure Thereupon.

The report of the Committee on Character and Fitness, and six (6) copies of the Committee's findings of fact and recommendations, shall be filed in the office of the Clerk of this court, who shall thereupon notify petitioner or his counsel of such filing and shall with such notice enclose a copy of the Committee's findings of fact and recommendations. If the Committee shall have recommended denial of the petition, the petitioner shall have ten (10) days from the date of his receipt of notice thereof from the Clerk within which to file with the said Clerk objections to the report and brief in support of such objections, together with five copies of such objections and brief; but no oral argument will be heard thereon. Upon consideration of the Committee's report and of such objections and brief as may have been filed by the petitioner concerning the same, the court shall enter such order as it may deem appropriate and may include in such order such provision for reimbursement of the actual and necessary expenses incurred in connection with the proceedings as shall appear just and proper.

31. Investigation at Instance of Chairman; Procedure Thereunder.

(a) Whenever, from sources deemed by him reliable, the chairman of the Commission learns of an attorney (who is licensed to practice in South Carolina) engaging in practices in violation of his duty as such attorney, and the Chairman comes to the conclusion that an investigation should be made, he shall designate one member of the Commission to act as an investigator. The member so designated shall investigate these reported violations of duty, and for this purpose he may call to his assistance such public investigating agencies as he may think proper. After making such investigation, should the investigator come to the conclusion that a complaint (as described in the section 7 hereof) should be made against the attorney investigated, he shall file such in his official capacity and be responsible for the prosecution thereof to a conclusion.

(b) When a member of the Commission shall have been selected to investigate the conduct of a particular member of the bar, he shall thereafter be disqualified to act as a member of the Commission insofar as such conduct of said member of the bar is concerned, otherwise than as such investigator and prosecutor as above set out.

32. Rule to be Liberally Construed.

The process and procedure under this rule shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objection, return, report or order, may be made at any time prior to final order of the court. Any party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This rule shall be liberally construed for the protection of the public, the courts, and the legal profession, and shall apply to all pending complaints, investigations and petitions whether the conduct involved occurred prior or subsequent to the effective date of this rule. To the extent that application of this rule to such pending proceedings may not be practicable, the procedure in force at the time this rule became effective shall continue to apply.

Every communication, whether oral or written, made by or on behalf of any complainant to the Board of Commissioners or any hearing panel or member thereof, pursuant to this Rule, whether by way of complaint or testimony, shall be privileged; and no action or proceeding, civil or criminal, shall lie against any such person, firm or corporation by or on whose behalf such communication shall have been made, by reason thereof.

33. The Board of Commissioners is empowered to adopt rules and regulations not inconsistent with this rule.

34. Nothing in these Rules shall be construed to deprive the Supreme Court of the authority to require the certification to it of the record in any case, for such action as it deems proper.